91-2034

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., individually

Petitioner,

-against-

V.C.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Where a natural genetic father seeks to enjoin the abortion of his unborn child, is the denial of the injunction by the Supreme Court of New Jersey violative of the Fourteenth Amendment rights of the father and the unborn child?

2. Is an order enjoining an abortion of an unborn child, entered at the request of the natural father during the first trimester of pregnancy violative of the Fourteenth Amendment due process rights of the fetus' mother?

3. Is the unborn child a person who enjoys rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States?

4. Does the scope of a woman's Fourteenth Amendment Right of Privacy, include a decision whether or not to terminate the life of an unborn child in circumstances where her own life is not in danger and the pregnancy is not the result of rape or its equivalent?

5. Is the nature of a woman's Fourteenth Amendment Right of Privacy, where that right legitimately encompasses a woman's decision to terminate the life of her unborn child during all three trimesters of pregnancy, a "fundamental" constitutional right, when the woman's life is not in danger and the pregnancy is not the result of rape or its equivalent?

6. Does the unborn child enjoy due process and equal protection rights under the Fourteenth Amendment which include that child's right to have his or her own natural father extended legal standing to assert the unborn child's constitutional rights?

7. Is the natural genetic father of an unborn child the individual possessing standing to raise the constitutional rights of the unborn child under the Fourteenth Amendment and does his standing rest upon his own constitutional rights, including:

   a. The natural father's Fourteenth Amendment Constitutional right to association and companionship with his child?

   b. The natural father's constitutional right to procreate?

   c. The father's constitutional right to discharge his moral and legal obligations to his children and protect them?

   d. The father's constitutional right to equal protection of the laws where denial of his participation in deciding the future of his child is based upon classification by gender?

   e. The cumulative weight of his own constitutional rights?

8. Where the state acts to enjoin a mother from having an abortion during the first trimester of pregnancy to protect the life of the unborn child, what is the correct standard of review of the state action: rational basis; strict scrutiny requiring a compelling state interest; undue burden or some other standard?

9. Is a determination by the State of New Jersey that the unborn child is a person throughout pregnancy (including the first trimester) to whom the State provides protection from abortion violative of the Fourteenth Amendment due process rights of the child's mother?

10. Does a natural genetic father of an unborn child possess his own Constitutional rights under the Fourteenth Amendment which, when balanced against those of the mother, require a state to prohibit an abortion which would result in the termination of the child's life?

LIST OF PARTIES

J.M.[1], petitions the Court in his individual capacity, asserting his personal constitutional rights. J.M. individually files this Petition under 28 *U.S.C.A.* §1257(a).[2]

At the same time of the filing of this Petition, J.M.[3] has filed a separate Petition in his capacity as Guardian Ad Litem, asserting the constitutional rights of his unborn child. The New Jersey courts have treated the petitioner as two separate parties in the same case.

The Respondent is V.C., the mother of the unborn child. V.C. was represented below by the American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York 10036; The National Organization of Women Legal Defense Education Fund, 99 Hudson Street, New York, New York 10013; and Stryker, Tams & Dill, 2 Penn Plaza East, Newark, New Jersey

[1] Hereinafter we refer to "J.M. individually" in relation to the claim in which J.M. asserts his personal rights, and "J.M. a guardian" in relation to the claim in which J.M. asserts the rights personal to the unborn child.

[2] See discussion, jurisdiction, p.2 below

[3] J.M. and V.C. are the initials of the plaintiff and defendant whose full names, addresses and identities were disclosed to the court, but the parties were ordered by the Appellate Division of the Superior Court of New Jersey to proceed with the initials only to protect the privacy of the litigants.

07105. The second defendant, W.M.C. is a hospital where V.C. had scheduled the abortion of the child. Because W.M.C. did not appear in the action and expressly stated that it would not participate at any stage of the proceedings, W.M.C. is not designated as a Respondent in this Court.

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ORDERS AND OPINIONS DELIVERED IN THE CASE

The following is the list of Orders and Opinions delivered in this case in chronological order:

	DESCRIPTION OF ORDER	FOUND AT
1.	Order of the Chancery Division of the Superior Court of New Jersey dated March 9, 1992 issuing temporary restraints enjoining V.C. from aborting the unborn child of V.C. and J.M.	67a to 72a
2.	Order of the Appellate Division of the Superior Court of New Jersey dated March 13, 1992 directing use of parties' initials only	73a
3.	Order of the Chancery Division of the Superior Court dated March 19, 1992 continuing the restraints against V.C. enjoining an abortion in favor of J.M. as Guardian Ad Litem and ordering dismissal of the Complaint brought by J.M. individually ..... (See transcript at 77a, 78a, 80a to 92a)	97a - 98a
4.	Order and majority opinion of the Appellate Division of the Superior Court (decision by two to one vote) dated March 23, 1992 dissolving the injunction, but declining to review the claim of J.M. as guardian, or J.M. individually	99a to 102a
5.	The dissenting opinion of Appellate Judge, Hon. Thomas F. Shebell, J.A.D., who would have held in favor of J.M. in both capacities ..	103a to 105a
6.	Order of the New Jersey Supreme Court dated March 24, 1992 dismissing the Complaint of J.M. as Guardian and vacating temporary stay of the App. Div. Order dissolving restraints	106a - 107a

7. Order of the Supreme Court of New Jersey dated March 24, 1992 denying J.M. individually leave to appeal the dismissal of his complaint .. 108a - 109a

8. The Order of the Supreme Court of New Jersey denying J.M.'s motion filed on March 31, 1992 as Guardian seeking reconsideration of the dismissal of the child's Complaint 110a, 111a

9. Letters from the Clerk of the Supreme Court of the United States stating that the Hon. David Souter and Hon. Clarence Thomas denied application for a single Justice Stay filed by J.M. as Guardian Ad Litem and in his individual capacity on March 25, 1992 ..... 112a, 113a

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a final order of the Supreme Court of New Jersey (the highest court of that State) entered on March 24, 1992. The Petitioner has consistently claimed rights under the Constitution of the United States and all constitutional issues raised in this Petition are raised in the briefs filed in the State courts. Accordingly, the Supreme Court of the United States has jurisdiction over this matter pursuant to 28 U.S.C.A. §1257(a).

Because of a highly technical interpretation of the New Jersey Supreme Court's Order of March 24, 1992, which may result in the characterization of it, for purposes of state Court practice, as less than final (as to J.M. individually but not to J.M.

as guardian), we observe the following. The procedural history in the state Courts (see Procedural History at p. 6 below) resulted in an order of the highest Court that was final under N.J. practice as it pertained to J.M. as guardian. Although the N.J. Supreme Court's decision ruled adversely as to the final interests of J.M. individually, that Court did not grant leave to appeal because, the Court stated its decision against J.M. as guardian "mooted" J.M.'s individual Complaint (see 106a to 110a).[4]

Nevertheless, the March 24, 1992 Order of the N.J. Supreme Court is a final Order within the meaning of 28 U.S.C.A. §1257(a). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 459, 95 S.Ct. 1029 (1975). *Cox* recognized that there are instances in which a State Court has finally determined a federal issue, yet additional lower state court proceedings remain. The Court held that further state court proceeding did not pose a bar to the litigant proceeding under 28 U.S.C.A. §1257(a). The result of the Order of the N.J. Supreme Court against J.M. as guardian clearly decided the rights of J.M. individually on the Federal Constitutional issue

[4] When J.M. individually sought reconsideration before the Chancery Division (because of the local practice), the Chancery Court expressed the view that the Supreme Court had disposed of the entire matter. J.M. individually has filed a Notice of Appeal in the Appellate Division of the Superior Court of New Jersey to preserve his rights under State procedure, if necessary.

in the most final of ways - the life he sought to protect was lost.

It is clear from the reaction of both the N.J. Supreme Court and the Chancery Court that the Courts of New Jersey treat the March 24, 1992 Order as final on the merits. The Supreme Court declared that J.M.'s individual case was "moot". The Chancery Court, upon reconsideration, stated that the Supreme Court had "affirmed" its dismissal of J.M.'s individual Complaint.

Alternatively J.M. individually would offer this petition under 28 U.S.C.A. §1651 to further the Court's jurisdiction.

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following provisions of the Constitution of the United States:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law" U.S. Const. amend. XIV §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

A. INTRODUCTION

This case involves a dispute between the two natural

parents of an unborn child who planned quite different futures for their child: the father sought to preserve the life of his unborn child threatened by an abortion planned by the child's mother.

This is an abortion case which presents this court, for the first time, with the direct clash of the rights of the mother, the father and the child, implicating the definition, scope and nature of those rights, the required balancing of each, and the powers and duties of the State in protecting the rights of each, where the two natural parents disagree on the fundamental question of whether their unborn child should continue to live. It provides this court with the opportunity to definitively delineate the power and duties of the State to regulate and prohibit abortion.

B. PROCEDURAL HISTORY

The petitioner, J.M., instituted this action seeking an injunction preventing V.C., the mother of his unborn child, from obtaining an abortion and terminating the life of the child. He brought the action on behalf of himself, asserting his own constitutional rights, and also as guardian ad litem of the child, seeking to protect the child's rights. The complaint was filed in the Chancery Division of the Superior Court of New Jersey on March 9, 1992 (1a to 10a). In support of an application for temporary restraints

enjoining the abortion, the plaintiff-petitioner submitted affidavits of J.M., Dr. Jerome LeJeune (a French geneticist) and Dr. Bernard Nathanson (a prominent New York Obstetrician and Gynecologist) (see 11a to 66a). Upon notice to the defendants V.C. and W.M.C., the Chancery Division entered the restraints enjoining the abortion until a return date of March 30, 1992 (see 67a to 72a).

On March 13, 1992, the Appellate Division of the Superior Court of New Jersey entered an Order directing the parties and the lower court to proceed using only the initials of the respective parties (see 73a). V.C., through counsel, appeared in the case and moved to dismiss the Complaint of J.M. individually, the Complaint of J.M. as guardian and dissolve the restraints. On March 19, 1992, the Chancery Court granted V.C.'s motion to dismiss the Complaint brought on behalf of J.M. individually, but denied the motion pertaining to J.M. as guardian of the unborn child. The court continued the restraints (see 97a to 98a; 77a, 78a, 92a). The court declared a need to resolve the question of "when life begins," stating that a resolution of that question is a prerequisite to determine whether the unborn child enjoys constitutional rights, and observed that the courts in New Jersey, have been called upon to make equally the difficult determination in defining when life

ended (in the "right to die" cases) (see 81a to 92a).

V.C. immediately filed a motion with the Appellate Division seeking: (1) leave to appeal from the order of the Chancery Division refusing to dismiss the guardian's Complaint and summary reversal thereof; and (2) dissolution of the Chancery Division's restraining order. The plaintiff, J.M. individually, filed a cross-motion seeking leave to appeal the interlocutory order of the Chancery Division dismissing his Complaint. On March 23, 1992, the Appellate Division (Judge Shebell dissenting) granted V.C.'s motion for leave to appeal the injunction only and summarily reversed the Chancery Division, vacating the restraints. That court denied V.C.'s application for leave to appeal the Chancery Division's refusal to dismiss the guardian's complaint. J.M.'s motion for leave to appeal the dismissal of his individual complaint was denied and was reviewed on its merits. The majority relied upon the U.S. Supreme Court rulings in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831 (1976) (see 99a to 105a).

In his dissent, Judge Shebell explained that he would not have vacated the restraints and would have reversed the Chancery Division's dismissal of J.M.'s individual complaint, stating:

> "The law pertaining to abortion is in a state of flux. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L.Ed.2d 410 (1989); *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d. 682, 695, 698 (3rd Cir. 1991). The United States Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973), in the view of many, represents erroneous interpretation of the Constitution - inventing a constitutional right to an abortion, now exclusively in the mother....In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. *Cf. Planned Parenthood of Cent. MO. v. Danforth*, 428 U.S. 52, 49 L.Ed.2d 788 (1976)...The courts ...perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge..." (see 103a - 104a).

The Appellate Division stayed its own order to permit both parties to be heard before the New Jersey Supreme Court the following day, March 24, 1992. As a result of the orders of the Appellate Division, the Complaint of J.M. as guardian was left undisturbed, but the temporary restraints were dissolved. J.M. as guardian, individually, filed a motion in the New Jersey Supreme Court seeking leave to appeal from the interlocutory order of the Appellate Division dissolving the restraints. J.M. individually moved for leave to file an interlocutory appeal from the dismissal of his complaint. V.C. moved before the New Jersey Supreme

Court seeking an Order granting leave to file an appeal from the interlocutory order denying a dismissal of the complaint of J.M. as guardian. That Court granted leave to V.C., entertained her appeal on the merits, and summarily reversed the trial court, dismissing the complaint brought by J.M. as guardian (see 106a, 107a). The New Jersey Supreme Court stated that it had "concluded that under current law" the plaintiff's proofs that the unborn child was indeed a human being, a person was irrelevant (106a).

The Supreme Court declined to grant leave to J.M. individually, stating that because the injunction was dissolved, his application was moot (see Supreme Court Order, 108a, 109a). The following day, March 25, 1992 single Justice Applications for a Stay of the New Jersey Supreme Court orders were denied by Justice Souter and Thomas (112a, 113a). The plaintiff, J.M. as guardian now petitions the Supreme Court for a Writ of Certiorari within the ninety (90) day period prescribed by statute. J.M. individually files a petition simultaneously.

C. STATEMENT OF FACTS

(i) The Relationship of J.M. and V.C.

J.M., 38 years of age, met V.C., 32, in July, 1991. In September, 1991 the plaintiff first proposed marriage to the

defendant. V.C., declined, indicating she would consider marriage in the future. In February, 1992, V.C. suspected she was pregnant (by J.M.). A self-administered pregnancy test proved positive for pregnancy and a repeat test in the presence of the plaintiff duplicated that result (see cert. of J.M. at 11a to 19a). On Monday, March 2, 1992, V.C. was examined by a physician in Monmouth County (N.J.) who confirmed that she was then 8 weeks pregnant. J.M. expressed his support to her, again proposed marriage, and indicated that he would discharge his obligations as father, whether or not they married or she felt capable of assisting in rearing the child. V.C. told J.M. that she was still unprepared for marriage and on March 4, 1992, V.C. advised J.M. that she had decided to seek an abortion scheduled for the morning of Wednesday, March 11, 1992 at a facility located in Monmouth County (see cert. of J.M. 11a to 22a). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he retained counsel on Saturday, March 7, 1992 and instituted this action on Monday, March 9, 1992 (see 11a to 22a). In the certifications filed by J.M. with the court, he certified that he was prepared to raise the child himself. J.M. stated, however, that he recognized that once the child was

born, V.C. may at that time change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. nor would he contest to be the primary custodian if she made that choice. In the event V.C. changed her mind and chose to be the primary custodian, J.M. certified that he would live up to his obligations as father (whether they married or not) with financial support and visitation. The support J.M. offered V.C., therefore, included marriage, or in the alternative, his offer to raise the child alone or in combination with her, subject to her choice (see 11a to 22a).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey Supreme Court Order of March 24, when the child was 11 weeks old. Had an abortion not been performed the child would be 24 weeks of age at the time this petition was filed.

(ii) Facts Pertinent to the Question of Whether Human Life Begins at Conception and evidence consistent with the conclusion that an unborn child can experience pain during an abortion.

The record contains eloquent and powerful testimony of Dr.

Jerome LeJeune, M.D.[5] and Dr. Bernard Nathanson[6], M.D. Their testimony and supplementation explains new knowledge of science, technology and medicine which bear upon the factual and legal considerations in this case (see Point II below). It supports

[5] Jerome LeJeune, M.D. is a world renowned geneticist currently teaching at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to chromosomes mistake (examining over 2,000 children each year and maintaining records of 30,000 children over his lifetime) (see 36a to 40a). Among the many of his life's achievements, includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to an "excess of genetic material" consisting of the extra chromosome, now known as No. 21. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (see 35a to 38a, 42a, 43a). In his work Dr. LeJeune attempts to understand the nature of every human being and how and why they are inflicted by "constitutional difficulty" (40a) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the United Conference in Moscow. In addition he was a member of the Pontifical Academy of Science and is a member of a special group that studied the damage of atomic war. He was requested by Pope John Paul II to travel to Moscow to speak with Mr. Brezhnev on behalf of the Vatican. He was the first to give a course on human genetics at the California Institute of Technology (40a to 43a).

[6] Dr. Bernard Nathanson is an accomplished obstetrician and gynecologist from New York City, educated at Cornell University and McGill University Medical College in Montreal, Canada. He was board certified by the American Board of Obstetricians and Gynecologists in 1960 and is currently an attending obstetrician and gynecologist at St. Vincent's Hospital in New York; St. Luke's Roosevelt Hospital, part of Columbia University College of Physicians and Surgeons; and New York Hospital Cornell Medical Center. Dr. Nathanson has published numerous scientific articles and several books in the area of bioethics, fetal development, embryology and fetology. He lectures in these areas and holds professorships at two universities. Dr. Nathanson probably has more experience in abortion technology than anyone in the Country, having been the director of the largest abortion clinic in the United States for two years, his research and publication in medical literature, his scientific papers on the techniques of abortion and his study of complications of abortion related issues (59a to 66a).

three separate and pertinent conclusions: (1) The life of a specific individual human being is a seamless continuum that commences immediately upon conception and the individual is complete with all genetic material specifically programmed for all future development and growth; (2) The individual is complete not only as to species but the unique identity of the specific member of the human race is complete immediately upon conception; (3) There is new scientific evidence which supports the conclusion that the unborn child is capable of experiencing pain during the second half of pregnancy and is consistent with the conclusion that the child may experience pain in the first trimester (Point II, Section C). There are a great many advances in science and medicine which bear upon the factual and legal aspects of when life begins. Man's knowledge of science and medicine has advanced to the point where reexamination of this information is required.[7]

[7] We observe that this court has already received amici curiae briefs in prior abortion cases which address medical and scientific considerations. *Webster v. Reproductive Health Services* dated March 30, 1989. The Brief of the American Medical Association, American College of Obstetricians and Gynecologists, et al. in support of appellees, *Webster v. Reproductive Health Services* dated March 30, 1999. If the Supreme Court granted J.M.'s petition in this case, petitioner, with the assistance of accomplished geneticists, biochemists and medical doctors would supply the court with additional scientific data and information. There is little doubt that members of the scientific and medical community who supports the position of V.C. would also make submissions to this court.

D. JUSTICIABILITY

Although the defendant represents that the child's life has been terminated, this case still represents a justiciable controversy. Based upon the principles annunciated by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the case presents a justiciable controversy because at the time the complaint was filed and for sometime thereafter it clearly presented a case and controversy. In *Roe* The court concluded that pregnancy litigation provides a classic justification for a conclusion of non-mootness because it truly provides a situation that is "capable of repetition, yet evading review". *Roe v. Wade* at 410 U.S. at 124, 93 S.Ct. at 712.

REASONS FOR GRANTING WRIT OF CERTIORARI

I. THE SUPREME COURT OF NEW JERSEY DECIDED EXTREMELY IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, RESOLVED BY THE UNITED STATES SUPREME COURT.

When the New Jersey Supreme Court entered its Order on March 24, 1992 dismissing petitioner's complaint and refusing to recognize the right of a father and child to obtain the injunction to preserve the child's life, the New Jersey Supreme Court decided constitutional questions that the United States Supreme Court has

never decided: That when a father and his unborn child assert their own rights and interests and appeal directly to a state court to protect each, a State has no constitutional obligation to recognize and protect the life of the unborn child.[8]

This case presents legal issues involving abortion rights in a context quite different than all of the prior reported decisions of this Court. It is not a case which seeks to balance interests of the state against those of a private citizen, but presents, for the first time, a direct conflict between the individual rights of the mother and those of her child and the child's father who seek to protect their own rights and interests. Consequently, it implicates quite different interests and rights which have never been directly addressed by the United States Supreme Court.

In *Planned Parenthood of Cent. Mo. v. Danforth*, 420 U.S. 52 96 S.Ct. 2831 49 L.Ed.2d 788 (1976) (hereinafter *"Danforth"*), the U.S. Supreme Court reviewed a provision of a state statute which required spousal consent. But that case did not address the interests or the issues presented by this one. In *Danforth*, the

[8] Under current New Jersey Law, a mother may have an abortion resulting in the termination of the child's life even to the end of the last trimester of pregnancy. See discussion below.

majority (by Justice Blackman) reviewed the statute in a rather limited context of a state's interest to protect the "perception of marriage as an institution." That case did not even implicate a state's legitimate interest in protecting life or potential life. This case involves the legitimate interest of a father to protect his child's life, and the child's own interest in life. In fact, the majority opinion did not even address the question of whether a father has any constitutional rights at all, because those rights were not implicated. *See, 428 U.S. at 54 - 84, 96 S.Ct. at 2834 - 2848.* The majority analyzed the entire question from the point of view of the limited state interest and the ability of the state to delegate its own interest to an individual citizen. It did not address the question of whether a father himself had any constitutional rights to protect the life of the child.

In the present case, the child's rights and the father's rights are directly implicated for the very first time. In *Danforth*, five Justices (Justices Stewart and Powell in a concurring opinion, and Justice White, Chief Justice Berger and Justice Rehnquist in a dissent) disagreed with the majority's narrow approach and argued that the father's own constitutional rights were indeed implicated. All five found that he had constitutional rights, and a majority of

those (Justice White, Rehnquist and Chief Justice Berger) found that the father's rights, when balanced against those of a mother, would require a State to preserve the father's rights. But the majority did not reach the issue of the father's rights (or the rights of the child) because the statute under review dealt with a man's status as spouse, not status as father. One was seen as quite different from those of the other.[9] In *Danforth*, therefore the Court did not rule on the questions presented by this case. The question of whether the child's life could be protected by the father based upon his own rights or those of the child was left unanswered.

This case also presents questions concerning the rights of the unborn child which have never been decided by the U.S. Supreme Court. No reported decision of this court has resolved a dispute directly involving the child whose interests were represented by a guardian and consequently the Supreme Court has never answered the question of whether a state must recognize the rights

[9] In this case the father, in his individual capacity, asserts four separate and distinct constitutional rights: the right to association and companionship with his child; his right to procreate; his constitutional right to discharge his obligation and duties to his child; and his right to the equal protections of the law. See Point III below; Justices White, Rehnquist and Chief Justice Berger base their 1976 dissent upon a father's constitutional right to association and companionship; Justices Powell and Stewart cited the father's constitutional right to association and a separate right to procreation. The law is more highly developed at the present time and support the four asserted constitutional rights of the father.

of the child when a child seeks to protection. Nor has the court ever answered the question of whether a State must exercise its power to protect the life of the unborn child at the request of either the father or child. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and its progeny established the clear principle that the state has a compelling interest in protecting the life of the unborn child in the third trimester of pregnancy.[10] *Roe* does not answer the question of whether there are circumstances under which the state must exercise its power (especially where there is a direct conflict) to protect the life of the child. *Roe* specifically observed that it did not address the rights of a father, which necessarily include a father's role in acting to protect the life of the unborn child, especially where a particular state refuses to exercise its recognized power to protect life. Id.

In the present case, the New Jersey Supreme Court refused to recognize any interest of the child, the father or the father on behalf of the child, even where the mother's life or health was not in danger and not the result of rape.

[10] The recent case of *Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040 (1989)* finds the compelling nature of the state's interest is present throughout pregnancy. See Point III below.

The current state of New Jersey law permits a mother to abort her child at any time up to the moment of birth for any reason. Prior to *Roe, supra,* New Jersey's policy was clearly anti-abortion and chose preservation of life over the destruction of it.[11]

[11] *N.J.S.A. 2A:87-1.* To preform an abortion was a high misdemeanor which brought a criminal penalty of up to fifteen years of incarceration. *See New Jersey v. Novak, 22 N.J. 231, 121 A.2d 521 (1956); New Jersey v. Siciliano, 21 N.J. 249, 117 A.2d 490 (1956); New Jersey v. Colmer, 45 N.J. Super. 236, 122 A.2d 325, (App. Div. 1957).*

In recognizing that adults have legal obligations to an unborn child in utero and establishing legal liability on the part of physicians to a child prior to birth, the Supreme Court of New Jersey recognized that the unborn child was a separate person and the "child" is in existence from the moment of conception. *Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 at 362-364 (1960).* In *Smith v. Brennan,* the New Jersey Supreme Court stated that:

> "Medical authorities have long recognized that a child is in existence from the moment of conception and not merely a part of its mother's body." 31 N.J. at 362...It is clear medical authorities recognize that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." 31 N.J. at 364.

In *Raleigh Fitkin - Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964),* the New Jersey Supreme Court found that the state had an interest in protecting the life of an unborn child. The court found that that right was personalized to the life of the unborn child and the court appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in the mothers womb even over the objection of the baby's mother.

In *Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967),* the New Jersey Supreme Court specifically stated that abortions were against the public policy of the State of New Jersey. In refusing to recognize the life of a mother to sue a doctor in medical malpractice for denying her an opportunity to obtain an abortion in a state where it was legal (because the child had downs syndrome) the New Jersey Supreme Court stated:

> "The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor...(that) it may have been easier for the mother

Following the U.S. Supreme Court decision in *Roe v. Wade* in 1973, the strong anti-abortion policy in New Jersey was superseded and the law evolved to a point of a total lack of recognition of the rights of the child and father. The New Jersey criminal abortion statute was not repealed until 1978, made effective in 1979. See *supra* text accompanying note 9. Prior to the legislature repealing the abortion statutes, the New Jersey Supreme Court twice construed the criminal statute following *Roe*. In *State v. Norflett*, 67 N.J. 268, 337 A.2d 609 (1975), the New Jersey Supreme Court upheld the New Jersey Criminal Abortion Statutes. Two years later in 1977 the New Jersey Supreme Court held that the *Roe v. Wade* decision was not to be applied retroactively. *Planned Parenthood of New York City, Inc. v. New Jersey*, 75 N.J. 49, 379 A.2d 1289 (1977). After the legislature completely repealed criminalization of abortion even in the third trimester, the New Jersey Supreme Court, in 1979, reversed its decision in *Gleitman v. Cosgrove*, by its opinion in *Berman v. Allan*, 80 N.J. 421, 404 A.2d 8 (1979), thereby extending to a couple a civil cause of

> and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged determinants cannot stand against the preciousness of a single human life...49 N.J. at 30, 31.

action against a physician in the so-called "wrongful birth" cases. In 1984 the New Jersey Supreme Court extended the wrongful birth cause of action even to the child following birth. *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755, (1984). By totally repealing the criminal abortion statute, New Jersey placed no restrictions on third trimester abortions. *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982) found that the New Jersey Constitutional right to equal protection required state funding of all therapeutic abortions. Although the New Jersey Supreme Court has never grounded the abortion right in the New Jersey State Constitution, that has been the position of the A.C.L.U. representing V.C. in this case. V.C. also maintains that in New Jersey a woman has an absolute right to an abortion up to the moment of birth. After 1979 there are no New Jersey cases which recognize that the child has any rights which could be balanced against any interest of the mother. Although the petitioner has argued to the New Jersey courts that current federal constitutional law permits New Jersey to return to its policy prior to *Roe*, the New Jersey Supreme Court rejected that course, refused to recognize any rights in the father and the child and leaves both unprotected throughout pregnancy. That New Jersey can refuse consistent with the

Fourteenth Amendment to enforce the rights of the father or the child, when their interests are directly implicated, has never been decided by the U.S. Supreme Court and the Court should grant petitioners writ for certiorari on that basis.

II. RECENT DEVELOPMENTS AND DISCOVERIES IN SCIENCE AND MEDICINE PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION RELEVANT TO THE QUESTIONS OF WHEN THE LIFE OF A HUMAN BEING BEGINS AND THAT THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTION, REQUIRING REEXAMINATION OF THE LEGAL QUESTION OF WHETHER AN UNBORN CHILD POSSESSES CONSTITUTIONAL RIGHTS UNDER THE FOURTEENTH AMENDMENT.

A. INTRODUCTION-LEGAL PRINCIPLES SET FORTH IN *ROE*

In *Roe v. Wade*, the United States Supreme Court concluded that Texas' imposition of criminal penalty for abortions was not justified based upon that "state's determination to recognize and protect prenatal life from and after conception constitut(ing) a compelling state interest." *Roe* decided that a State's interest in protecting the life of an unborn child is compelling only in the third trimester of pregnancy. 410 U.S. at 163, 164 S.Ct. at 732. Changes in the law[12] and significant recent developments and

[12] Discussion of recent changes in the law are reserved for Point III below which addresses New Jersey misinterpretation and misapplication of the current law. This point is confined to the developments in science and medicine.

discoveries in science and medicine require a thorough re-examination of Section IX(A) and IX(B) of *Roe v. Wade*.[13] The conclusion of the Supreme Court that a state's interest in protecting prenatal life was compelling at one stage but not at another involved two general inquiries that were separate yet inextricably connected: (a) whether the Fourteenth Amendment provided an unborn child Federal constitutional protection as a person under the Due Process clause; and (b) when does the life of a human being commence to justify legal protection. Two important statements that were made now require scrutiny:

> (1)"...The word 'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729; (2) we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159, 93 S.Ct. at 730. (emphasis added)

The combined treatment of these inquiries resulted in the Court adopting the trimester system, which appears to have been since discarded by the court as a consequence of *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040

[13] 410 U.S. at 156-162, 93 S.Ct. at 728-731.

(1989) (see discussion under Point III below).

The question of whether an unborn child is a person who enjoys constitutional rights under the Fourteenth Amendment is a legal one, but one which contains within it an important factual component. Science and medicine are currently able to provide data and information pertinent to the factual considerations far beyond that contributed in 1973. The legal inquiry, simply put, is whether the human life with which we deal does or should enjoy rights under the Fourteenth Amendment at any or at all stages of development between conception and birth (recognizing that children who survive birth range in age from twenty-three weeks to forty weeks post conception). By suggesting that science and medicine can establish when the biological life of a person begins is not to suggest that the court should defer to science. Quite to the contrary, if the members of the scientific and medical community themselves state that they cannot reach a consensus, that fact does not bear upon the need of the court to reach the legal conclusion which, by its nature, includes the fact question. The ultimate judgment, being a legal one, may be arrived at in consultation with science. By reaching a legal conclusion concerning which human beings and at what age of development enjoy constitutional

rights the court makes the judgment of when life begins because the practical consequences of the judgment necessarily include the factual considerations.[14] Expressly stated or not that is really the motivating force which gave birth to the trimester formula: what we knew weighed against what we were not sure of.

There can no longer be serious doubt about when the life of a new human being begins (see Point II Section C). That some members of the scientific community might postulate that there is no consensus on when life begins, indeed some have so stated to this Court[15] does not contradict reliability and wide spread acceptability of the relevant scientific information. To state, concerning the proposition that "life begins at conception", that individual scientists will have individual answers based upon their

[14] While we sincerely empathize with the sentiments expressed by Justice Scalia in his concurring opinion in *Cruzan v. Director, Missouri Department of Health, 110 S.Ct. 2841 at 2859 (1990)*, there are certain issues, even concerning life and death, that only the nine justices of the United States Supreme Court have the power to determine, the only consolation being that the rest of us will bring to them their thoughts, abilities, arguments and knowledge. When a state completely fails to protect the life of a human being, even a human being yet born, and that state's failure to act may result in a painful, brutal death of a member of the human race (ignoring the constitutional rights of one of the natural parents) there is nowhere left to appeal but the United States Supreme Court.

[15] See amici curiae of "167 Distinguished Scientists and Physicians, Including Eleven Nobel Laureates, In Support of Appellees (*Webster v. Reproductive Health Services 1988*), p.3-7).

individual "values and beliefs, fails to answer the real inquiry.[16] That statement suggests that the individual scientist is offering a value judgment rather than stating factual knowledge shared by the scientific comments. The argument that the statement "life begins at conception" goes "far beyond the realm of medical science, and into social, religious, philosophical, ethical and moral concerns,"[17] explains, why there is no recognizing "consensus" when there is virtual universal acceptance of the important facts: The individual scientists inject their personal religious, moral and social bias into their answer. Based upon the scientific factual data the human is biologically complete at conception. That some scientists personally prefer to give that human life no value expresses a view which does not lie within their domain and it merits no more consideration than the view of those from non-scientific disciplines.

This is precisely why the lack of a consensus among science and medicine is an irrelevant legal inquiry; when human life begins is truly a legal question. It is a legal question that encom-

[16] Id. at 4.

[17] *Id. at 6.*

passes factual questions scientific and medical in nature, as well as ethical and moral concerns.[18] It is the promise of the law, especially constitutional law, to balance the relative harms conduct has on individuals. Legal questions often encompass these moral and ethical considerations. Oliver Wendell Holmes once observed:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race."[19]

The court's have been compelled to reach a legal conclusion on when "life ends" even when medicine had difficulty reaching a consensus on the issue. *Cf. In re Quinlin*, 70 N.J. 10, 355 A.2d 647 (1976). The court in determining the difficult question of when protectable life begins, must consult with science to determine when the actual life of a human being begins as part of that inquiry. In *Roe*, in concluding that the State did not have a compelling interest to protect the life of the unborn in the first two trimesters, the court found that it was "persuaded" that the word

[18] That the scientific and factual data is relevant to the inquiry and that the moral and ethical concerns are surely relevant is an observation with which we can't dispute. Although religious beliefs may account for the fervor with which some feel compelled to speak out on the issue, they are not the precise type of consideration upon which legal principle can be based.

[19] Oliver Wendell Holmes, Jr., *The Path of the Law, 10 Harvard Law Review, 457 (1897).*

"person" as used in the Fourteenth Amendment did not include the unborn. 410 U.S. at 158, 93 S.Ct. at 729. To reach this statement the court primarily relied upon a review of those clauses in which the word "person" appeared. This aspect of the court's discussion was unsatisfying because it ignored the context of the equal protection clause contained within the Fourteenth Amendment, ratified in 1868. Two clauses that the court noted as containing the word "person" were the Fifth Amendment Due Process Clause and Article IV, §2, clause 3 (fugitive slave clause). The Fifth Amendment extends due process to any "person." The fugitive slave clause used the term "person" to individuals who did not enjoy liberty within the slave states. It would appear that the term when used in Article IV, ratified in 1787, and the Fifth Amendment Due Process Clause, ratified in 1792, was an all inclusive term because it included natural persons who enjoyed constitutional protections and natural persons who did not enjoy liberties but were subject to slavery laws. An argument could be made that the word "person" includes all members of the human race, all human beings. However, in determining whether the word "person" as used in the due process clause, which was ratified in 1868, could have been intended to include some classes of human

beings but not others (which is what the *Roe* court would have to infer if it reached its conclusion independently of the fact intensive inquiry into the question of when life begins) the court should have construed the due process clause in *pari materia* with the equal protection clause (introduced to the constitution for the first time in the Fourteenth Amendment). The Fifth Amendment did not include equal protection language. The equal protection clause forbids denial to "any person within its jurisdiction" the equal protection of the laws. To suggest that the word "person" as used in the equal protection clause (and therefore the due process clause) could contain within it classes of "persons" such that the clause would apply to some but not to others, would constitute an inherent contradiction which would render the equal protection clause totally meaningless and without consequence. Therefore, any legal inquiry into the legal question of whether the Fourteenth Amendment protects an unborn child (and the meaning of the word "person") can only be conducted simultaneously with the *Roe* court's inquiry under Section IX(B) when the life of a human being (the life of a person) begins.

B. RECENT ADVANCES IN SCIENCE, TECHNOLOGY AND MEDICINE HAVE BROUGHT THE CURRENT LEVEL OF MAN'S KNOWLEDGE TO A POINT WHICH REQUIRES A RE-

EXAMINATION OF THE ROE COURT'S DISCUSSION UNDER SECTION IX(A) AND (B) OF ITS 1973 DECISION. THE RE-EXAMINATION OF THE *ROE* DETERMINATION IS ALSO REQUIRED FOR REASONS SET FORTH IN THE OTHER POINTS IN THIS PETITION.

Stare decisis is not a bar to the reexamination which we urge. Our research has disclosed one hundred and seventy-three instances in which the United States Supreme Court has overruled, in whole or in part, its previous constitutional decisions.[20]

Numbered among those on hundred seventy-three decisions is *Grosjean v. American Press Co.,* 297 U.S. 233 (1936), which expanded the definition of "person" as it was used in the Fourteenth Amendment Due Process Clause. Prior to the court's holding in *Grosjean*, the Court had ruled that a corporation was not a "person" within the meaning of the due process clause of the Fourteenth Amendment. *See Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Association v.*

[20] The present compilation consisting of the 173 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnett v. Coronado Oil and Gas Co., 285 U.S. 393, 406-409 nn. (1932); Annette E. Wilson "Stare Decisis" Quo Vadis? 33 Geo. L.J. 251, 254, n. 17 265 (1945); William O. Douglas "stare decisis" 49 Colum. L.Rev. 735-743, 756-758 (1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court 57 Mich. L.Rev. 151, 184-194 (1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). Payne v. Tennessee, 111 S.Ct. 2597, 2610, 2611 n.1 (1991).* For the complete list of cases, see the appendix immediately following this Petition.

Greenberg, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925). *Grosjean* is specific precedent of the U.S. Supreme Court which has expanded the class of "persons" to whom the Fourteenth Amendment Due Process Clause would apply.

Of particular relevance here is the now classic and often cited statement of Justice Brandeis contained in his dissenting opinion in *Burnett v. Cornado Oil and Gas Co.*, 285 U.S. 393, 405-413. Justice Brandeis there stated, in pertinent part:

> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance, is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character."

The question of whether an unborn child is a person to whom the Fourteenth Amendment should be applied is a mixed question of fact and law, and is precisely the type of determination, when man's knowledge becomes more expansive, of which Justice Brandeis speaks. After all, when the life of a human being commences, is, fundamentally a question of fact. The Brandeis analysis has been frequently cited with approval. See *Solorio v. U.S.*, 107 S.Ct. 2924, 2999 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969)); *United States v. Scott*, 98 S.Ct. 2187, 2199 (1978). *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3067 (1989) (Blackman, J., dissenting) The scientific and medical information now available require a re-examination of the facts relevant to the question of whether an unborn child does or should enjoy the protection of the Fourteenth Amendment.

C. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTIONS.

Since the *Roe* Court commented upon the then current knowledge of mankind in 1973, there have been many scientific,

medical and technological advances and discoveries, many in the last five years. These include the following: (1) Recombinant DNA Technology[21]; (2) DNA Probe Technology[22]; (3) Southern Blot[23]; (4) Northern Blot[24]; (5). DNA Mapping[25]; (6). DNA Finger Printing[26]; (7). Polymerase Chain Reaction (PCR)[27]; (8). Monoclonal Anti-Body Technology[28]; (9) Hybridona Technique[29];

[21] Methodology which (among other things) allows the production of a large amount of specific pieces of DNA which assists in DNA probe research.

[22] Use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence. Among many other uses, it is a method which identifies the DNA or RNA that codes for "Substance P".

[23] The technology that combines the separation of molecules by electric charge and size with DNA probe technology.

[24] The technique that combines the separation of molecules by electric charge with size along with RNA probe technology for DNA.

[25] The process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes). The mapping is often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived.

[26] A procedure first demonstrated in 1985, whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern. The procedure is finding increased usefulness in forensic science and legal medicine as it provides a test for relatedness between samples of DNA (extracted from human tissue). used in conjunction with the PCR technique such comparisons can be done on as little as one cell from each source.

[27] PCR - a test-tube method of amplifying DNA sequences hundreds of millions to billions of times invented in late 1984 and 1985 and can be used to obtain information from a single cell.

[28] Antibody preparation which contains only single type of antibody molecule.

(10) Flow Cytometry[30]; (11) Improved Ultrasound Technology[31]; (12) DNA Methylation[32]; (13) Fetal Heart Monitoring[33];

1. The exploding Revolution of Molecular Biology has changed Man's knowledge of Developmental Neurobiology.

Since the decision of *Roe v. Wade* there has been a revolution in the biological sciences brought about by the development of the new scientific technology. A field generally known as molecular biology has come to dominate biological investigation. This technology, together with the production of monoclonal antibodies and very recent developments in modern protein chemistry and electrophysiology, is applied to questions pertaining to developmental neurobiology. During the mid-1980's these techniques began to give insight into the development of the

[29] Used to produce human specific antibodies and in the detection of Substance P and other human proteins or peptides.

[30] A technique by which cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light (a laser is often used) the interaction produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property. The technique is being used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood.

[31] Vastly superior technology which permits observation of the fetus at early ages of gestation.

[32] Modification of DNA so that it is recognized as different.

[33] Device which creates the ability to observe the operation of the human heart of the fetus at early stages of development.

central nervous system. Early results of the application of the technology pointed to the fact that the classical histological and functional criteria for finding neuronal cell types was oversimplified.[34]

The presence of peptides (the hormones) of the endocrine system were well known in 1973; but since then the presence of similar substances have been discovered in nerve fibers. This discovery of more than thirty neuropeptides was described in 1985 as a recent and revolutionary discovery. Ballesta J., et al. *Distribution and Localization of Regulatory Peptides*, Crit. Rev. Clin. Lab. Sci. 1985, 22: p.185-218. These neuropeptides include "substance p" and "enkephalin". In 1973 science did not understand the function of substance p or its association with pain. Information to date point to a very complex process of interacting peptides, receptors, modulators, ion channels, among other things. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, technologies developed and markedly improved since 1973.

[34] Fischbach G.D. *An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation, In Molecular Neurobiology In Neurology and Psychiatry*, N.D. Eric R. Kandel, Editor, 1987, Raven Press, New York, p.143-153.

The origin, development and extensive use of molecular biological techniques since 1973 has changed the way in which modern biology is carried out. Using recombinant DNA technology (Watson, J.D., et al. (1983) *Recombinant DNA: A Short Course*, W.H. Freeman, San Francisco) and monoclonal antibody technology (Campbell, A.M. (1985) *Monoclonal Antibody Technology*, In Laboratory Techniques and Biochemistry and Molecular Biology, edited by R.H. Burdon and P.H. Van Knippenberg, Elsevier, Amsterdam) scientists now have the ability to explore biological information at the molecular level. The DNA technology includes such techniques as DNA probe technology, DNA cloning, southern and northern hybridization techniques, DNA mapping technology, the use of restriction endonuclease enzymes, and gene amplification using the polymerase chain reaction (PCR). Using DNA probe technology combined with the southern hybridization technique, for example, scientists are able to detect the presence or absence of specific genetic material in a sample of tissue. When these techniques are combined with PCR (Arnheim, N., et al. *Application of the Polymerase Chain Reaction to Organismal and Population Biology*, Bioscience, 1990, 40:p.174-182; Arnheim, N., et al. *Polymerase Chain Reaction*, in Chemical Engineering News 1990,

p.36-47) it is possible to identify the presence of specific genetic material in a sample as small as one cell. Holding C., M. Monk, *Diagnosis of Beta - Thalassemia by DNA Application in Single Blastomeres from Mouse Preimplantation Embryos*, Lancet, 1989, 11 p.532-5; Handyside, A.H., et al. *Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification*, Lancet 1989, 1: p.347-49. In practical terms, this means that investigators determine at a molecular level that a particular protein exists and whether a specific signal has been transcribed. Since *Roe*, technology developed allowing the production of human specific antibodies which helps determine whether a protein has been produced from specific genetic instruction. Martinis, J., et al. *Novel Applications of Monoclonal Antibodies*, Basic Life Sci. 1983, 25: p.129-154. These techniques, combined with immunochemistry technology, can be used to determine that a specific protein is present in a sample and can lead to a determination of where this specific protein exists. The cumulative affect of these new technologies is to demonstrate the rudimentary nature of the knowledge of science and medicine in 1973, when our knowledge concerning human development before birth was based upon gross morphological observations and biochemical studies on often

heroic quantities of materials. In 1973 the scientists would observe a physical structure such as the cerebral cortex or dendritic spines. When a structure was not observable or was removed, the scientist could only observe what "appeared" to have happened. But the new technologies and techniques in molecular biology have enabled science to acquire and determine human developmental biological events before they can be seen as specific structures to gross morphological observations. It is now possible to examine proteins and the genetic construction to manufacture those proteins and can determine that not only the gross biology but the development at a molecular level. The technology has resulted in information which demonstrates that previous assumptions may be incorrect. It has only been in the last ten years that man's knowledge has advanced to the point that it supports the conclusion that the unborn child experiences pain and provided evidence consistent with the conclusion that the unborn child is capable of feeling pain at a relatively early point in fetal development. At the time of *Roe*, it was believed that neonates could not feel pain. Fitzgerald, M., et al. *Pain and Analgesic in the Newborn*, Arch. Dis. Child, 1989, 64: 441-443. In addition, the new technologies have uncovered scientific information unknown only two to four years

ago proving the complete nature and essence of the unborn child from the moment of conception.

3. Recent Developments and Discoveries in the Science of Genetics Support a Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary and sufficient for a particular human being exists at the moment human life begins at conception. When the head of the male sperm penetrates inside the female's ovum is the precise moment when the genetic information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present immediately after conception. (Testimony of Dr. Jerome LeJeune[35] (hereinafter "LeJeune") 26a, 27a); Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Either the whole information is present for conception of a human

[35] Dr. LeJeune, a world renowned geneticists who provided testimony which is made part of the record of the present case. See n.3 at p.12 above.

being for development to full stages of human growth, after the moment of the entry of the sperm into the ovum, or the genetic information is insufficient and no human being shall develop and conception will fail. LeJeune, 26a, 27a; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584. Not only is it possible to identify the resultant cell after conception as being human the individual entity is known and can be identified. (LeJeune 27a). This new constitution is complete in all of itself, which is capable of being identified, capable of being read, and the makeup of chromosomes complete. We have, in short, a human being immediately after conception. (LeJeune 27a; Moore, *supra*, 26-28; Volpe, *supra*, 18-20).

In the process of fertilization is an extraordinary device employed by nature to protect the privacy of the life of the person immediately after conception - as if the right of privacy is written into the law of nature. The egg, a little sphere of one and one-half

millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg. Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm. (LeJeune 28a).

The necessary genetic information to create a human being is created in DNA, a long molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put on the point of a needle. It is twenty-three pieces of chromosomes. The ovum also contains twenty three chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the RNA in protein constituting the genetic makeup. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable so that the greatest computers cannot hold the amount of information that is inside one reproductive cell once

fecundation occurs. (LeJeune 28a, 29a).

The interaction of the biological components can be analyzed to the process of a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information. (LeJeune 29a, 30a).

Approximately six years ago, an englishman, Alec Jeffreys,

discovered and developed a technique which has the capabilities of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes, the DNA is repetitive. It can be repeated as much as one hundred times. Jeffreys developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffreys' method can be used to prove that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of and specific to the person being examined. That the identity of the person or the individualization of the member of the human race takes place at conception can be confirmed by the Jeffreys method. (LeJeune 30a, 31a); Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human Heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991).

Methylation of cytosine represents a very recent discovery

which supports the conclusion that a human being is a complete person upon conception. It's significance was unknown four or five years ago. Recently discovered is that DNA is even more sophisticated than previously suspected and the messages are written letter by letter, piece by piece. DNA contains basic information with indications that some information must be read immediately and some at a later time. What is meant by the methylation process is that everything to make a particular human being exists at fertilization but is not read at the instant of conception. This discovery was never expected ten years ago and was never predicted: that, in fact, the father's genes underline instructions to immediately produce the membranes inside which the embryo will develop itself and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm, not in the mother's egg. The male genetic material, therefore, builds the membranes which becomes the shelter in the placenta which is the food gathering system. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy. All of this information and the sophisticated directed mechanisms is con-

tained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It is absolutely required that in the first cell, there be the DNA underlined by methylation in the male way and DNA methylation in the female way. The extraordinary observation made is that the only cell in all of the life of a person in which those two methylation systems from father and mother are present inside one cell is the very first cell which gives life to a person. At each progressive stage of development this methylation is erased and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned, for instance, that the male way of "spelling" is obligatory for muscles, so that even in the female information from which muscles are built to be underlined in a paternal way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is a complete human being programmed for life from conception. LeJeune 31a, 32a; Chaillet, J.R., et al., *Parental-Specific Methylation of an Imprinted*

Transgene is Established During Gametogenesis and Progressively Changes During Embryogenesis, Cell, 66:1-3 (77-83) 1991; Surani, M.A.H., et al. *Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryonic Genome, Cell*, 45, 127-136 (1986); Swain, J.L., et al. *Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting, Cell*, 50, 719-727 (1987)). It is the opinion of Dr. LeJeune that there is a completeness of the human being and his or her identity from the moment of conception. The essence of the human being is complete (LeJeune 33a, 34a, 35a).

4. The Stages of Growth of the Unborn Child is a Seamless Continuum from Conception to Birth; Advances in Medicine Pertinent to the legal Inquiry.

The "stages of growth and development" of the new human being is a "seamless continuum" (see testimony of Dr. Bernard Nathanson[36] at 46a-50a). The terms zygote, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being.

[36] See n.4 at p.12, above; 59a to 66a.

(Nathanson 50a).

"Real time ultrasound" was developed in 1976 and actually created a motion picture which could depict movement and function such as breathing, urination, swallowing and other functions of the human existence. Abnormalities in things such as heart valves can be detected and rather sophisticated fetal surgery is currently performed on unborn children at four to five months, during which a mother is anesthesized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while the baby is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and the mother repaired. The child is able to proceed through the pregnancy to, at, or near full term and these operations are done at relatively early stages of development of the child. (Nathanson, 51a, 52a). The electronic fetal heart monitor a recent development, tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music (Nathanson, 52a, 53a). At eight

weeks of age a child's brain has formed (the child's brain continues to form following normal birth through childhood and adolescence). (Nathanson, 53a) The child functions in a very human way, excretes urine, and its heart beats regularly. The brain waves have been isolated and detected at eight weeks following conception.

The child is always a separate individual from the mother. Circulations are always separate. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize parts of the mother as being her body. It also distinguishes a body that is not part of itself. If a foreign substance enters a person's body the white blood cells recognize it and immediately attack to expel it. When pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being. The trophoblast which con-

structs the placenta serves as an immunological wall. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled, which are referred to as "spontaneous miscarriages" (Nathanson, 53a-55a; Hegde, U.C., Immunomodulation of the Mother During Pregnancy, Medical Hypothesis; 35:159-64 (1991)).

5. Based upon New Scientific and Medical Information, the Unborn Child Experiences Pain During Abortion in the Third Trimester and the Evidence is Consistent with the Conclusion that an Unborn Child may Experience Pain even in the First Trimester of Pregnancy.

Dr. Bernard Nathanson has expressed the opinion that the unborn child experiences excruciating pain during abortion. A vivid description which Dr. Nathanson claims supports this conclusion is incorporated in a film of an actual abortion entitled "The Silent Scream" made in 1984. Recent discoveries discussed below, now provide scientific data and information which supports that contention. Dr. Nathanson describes the film of an abortion of a child at the stage of 8 weeks through the use of ultrasound technology. In the abortion, the doctor puts an instrument into the womb to dilate the cervix, the water is broken and the embryonic fluid is permitted to flow out. Then the doctor inserts a suction apparatus into the uterus. It can be seen that the baby moves away from the

suction apparatus. The suction is turned on and a tremendous negative force is used to pull the baby from its living quarters. In the suctioning process the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart. Dr. Nathanson explained that the head of the baby was too large to be suctioned out so the doctor took a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around it and then close the forceps. The film, according to Dr. Nathanson, reveals that the child's head is actually crushed in the process. It is Dr. Nathanson's opinion that an abortion of an unborn child in the mother's womb subjects the human being to unimaginable agony and it ends the life of a person in a barbaric and bloody manner. In the film it can be seen, according to Dr. Nathanson, that the mouth of the young unborn baby is open. It is described as a dramatic, arresting moment and heart stopping moment. It can be seen that the child was grimacing and was evidencing pain and agony (Nathanson 55a-58a).

Studies being conducted as a result of new technology available have resulted in data and information from which we can conclude that the unborn child is subjected to great pain if an abortion takes place in the third trimester, and the evidence is consistent with the

conclusion that an unborn child may experience pain during a first trimester abortion.

In the last six years modern science has examined the relationship of substance "p" and pain. Uddman, R., et al. *Peptide - Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involved in the Extracranial Pain?*, (1986) 27:p.391-399. It has been found that one of the neuropeptides (substance "P"), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization. Luo, C.B., et al. *Localization of Substance "P" and Enkephalin by Immunohistochemistry in the Spinal Chord of the Human Fetus*, Neuro Science (1988) 27 p.989-93. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration. Manolidis, L.S., et al. *Substance "P" in the Acoustic Area of the Cortex During Neonatal Development and Maturation*, Actaotoaloryntol (1989) (Stockholm) 107:375-382. Substance "P" was found to be present in neuronal elements of the human cortex at eighteen weeks gestation (the earliest time point tested) (Mandolis, et al., *supra*, 1989). Others have found Substance "P" present as early as five weeks gestation and has been detected at all stages of development wherever examined

from that point thereafter (Tam, P.A., et al. *Maldevelopment of Spinal Cord - Substance "P" in Spina Bifida*, Z Kinderchir, 1986, 641:p.206-8; Wadhwa, et al. *Substance "P" - Immunoreactivity In a Developing Human Retinogenicualte Pathway*, Neurosci. Let. 1988, 89:p.25-30; Paulin, et al. *Ontogeny of Substance "P" in the Digestive Tract, Spinal Cord and Hypothalamus of The Human Fetus*, Regul. Pep., 1986, 14:p145-153. Substance "P" alone cannot be suggested to be sufficient for pain transmission. The involvement of neuropeptides in pain transmission was not known in 1973. Nor were they part of the discussion when science originally formulated a proposition that there was a need for a sensory cortex for pain perception.

It is a very important and recent observation, that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at eleven weeks post fertilization, and enkephalin positive neurons and nerve fibers were detected at thirteen weeks post fertilization. The levels of substance "P" and enkephalin at twelve to fourteen weeks were comparable to levels of the full term baby. In 1990, as a result of this revelation using molecular biological techniques, researchers have stated that

the importance of the early appearance of enkepha-

lin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed. [37]

None of the significant techniques used in the Yew study were available in 1973 or significantly thereafter. Until recently, science was incapable of even formulating questions no less deriving answers concerning the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of those key chemicals when *Roe v. Wade* was determined. A recent review (1991) summarized the current state of understanding of the function and development of the brain in the developing human. Lagercrantz, H., et al. *Functional Development of the Brain and the Fetus in the Infant*, Lakartidningen, 1991, 8-8:p.1880-5. There the authors observe:

> "neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex

[37] Yew, D.T., et. al. *Development and Localization of Encephalon and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience, 1990, 34 to p.491-8.

movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks." Lagercrantz, *supra*, 1991 at 1880-5.

Using gross morphological observations on cortical developments pro-abortion amici have pointed to 28 weeks as a point when the human fetal brain is capable of the same range of neurological activity as the brain of a full term newborn (including presumably pain detection and response) (see amici curiae brief of 167 Distinguished Scientists and Physicians, including Eleven Nobel Lauriets in Support of Appellees '*Webster v. Reproductive Health Services*, et al. at p.14-16).[38]

However, the evidence that science is now uncovering is consistent with the conclusion that the unborn child is capable of experiencing pain before the twenty-eighth week and perhaps as early as the first trimester. It is currently questions that cortical involvement is necessary for pain perception. Boreus, L.O., *Pain in the Newborn-Pharmacodynamic Aspects*, Dev. Pharmacol. Ther. 1990, 15:p.142-48. In fact, one of the neurosurgical methods for controlling severe chronic pain is cortex ablation. These methods

[38] Proponents of abortion therefore conceded that at least starting at 28 weeks the child has all the physiological development previously believed necessary for experience of pain.

have provided some relief, but often the pain returns. Melzack, R., IV. *Comment: Sensory and Pharmacological Modulation of Pain*, Can. J. Physol. Pharmacol., 1991, 69 p.695-696. The scientific ability to understand pain conduction in the unborn child at early stages of gestation is not completely known. It is simply error to make the statement that the fetus in the early stages of development does not feel pain and the evidence is mounting which is consistent with the conclusion that the fetus does feel pain. It is only in the last decade that the traditional concept, in vogue at the time of *Roe*, that neonates can not feel pain was challenged.

In the current state of medicine, with operative procedures being performed on premature babies as early as five months, it is a standard medical practice to anesthetize the child (at any age). See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989.[39] Anesthesia is used on fetuses in operations because of the premature children's experiencing of pain. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked

[39] For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These activities are consistent with stress experienced with pain. It has been shown that these endocrine metabolic responses are abolished by giving anesthesia to preterm neonates. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been suggested that the unborn child as young as eight weeks feels discomfort and moves about in the mother's womb precisely to avoid discomfort.[40]

D. The Court Should Take This Case and Re-examine the Question of Whether an Unborn Child Enjoys Rights Under the Fourteenth Amendment

The definition of the word "person"[41] in the Fourteenth Amendment and inquiry concerning when life begins are interrelated. That it is necessary that the law provide a definition is made obvious by the fact that five month old babies prematurely born survive. When a state such as New Jersey permits the poten-

[40] Pinchot, R., *Reproduction of the Cycle of Life*, in the Human Body, Monshol, B., Tonstar Books (1985) p.81.

[41] The first definition of "person" offered by Webster's dictionary is: "an individual human being, especially as distinguished from a thing or lower animal" Webster's Deluxe Unabridged Dictionary, Dorset and Baber, 2nd.ed. 1338 (1983).

tially painful death of unborn children between five and nine months through abortion no one can seriously debate that these children are persons by any definition. It is irrelevant to such inquiry whether the specific child has been prematurely birthed or lives in a mother's womb.[42] If a person is defined as a being that possesses the essence of a human then the life of a person begins at conception when the individual is complete. We would urge that the Court re-examine the question of when life begins and whether the unborn child enjoys constitutional rights. When a state such as New Jersey offers no protection, the fate of a five, six or seven month old unborn child, whether he or she experience the pain associated with a brutal death through abortion should not hinge upon the misfortune of being within the State of New Jersey. Science and technology is now at such a state in man's knowledge that a reexamination of these questions is required.

III. THE DECISION OF THE NEW JERSEY SUPREME COURT OF MARCH 24, 1992 DECIDED FEDERAL CONSTITUTIONAL QUESTIONS IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES. IN ADDITION, THIS CASE PRES-

[42] An esoteric distinction based upon dependence upon the mother which distinguishes the child's predicament misses the point: an adversarial equal protection argument can only follow the conclusion that both the born and unborn child are persons.

ENTS THE BEST OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO DEFINITIVELY RESOLVE ALL OF THE INTERESTS OF ALL OF THE PARTIES OF AN ABORTION DISPUTE AND TO CLEARLY AND FINALLY DEFINE THE POWERS AND OBLIGATIONS OF THE STATES TO REGULATE AND PROHIBIT ABORTION.

The decision of the New Jersey Supreme Court, in this case, by permitting the abortion over the objections of the father, conflicts with the applicable decisions of the U.S. Supreme Court including *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040 (1989), *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926 (1990), *Ohio v. Akron Center for Reproductive Health*, 497, U.S. 502, 110 S.Ct. 2972 (1990), as well as numerous Supreme Court decisions dealing with the rights of the father and child, and federal constitutional principles of due process and equal protection of the laws.

In addition, the competing interests and rights presented by this case, make J.M. v. V.C. the best opportunity for the U.S. Supreme Court to definitively resolve all of the interests of the parties in an abortion dispute and comprehensively define the powers and obligations of a state to regulate and prohibit abortion.

A. THE NEW JERSEY SUPREME COURT DECISION CONFLICTS WITH THE PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT AS THEY RELATE TO THE RIGHTS OF THE UNBORN CHILD.

The trimester system and the *Roe* principle that a State lacks a compelling State interest in potential life prior to the third trimester has been rejected in recent U.S. Supreme Court decisions. In *Webster v. Reproductive Health Services*, supra, the plurality wrote:

> "We do not see why the State's interest in protecting potential human life should come into existence only at the point of liability and there should therefore be a rigid line allowing State regulation after viability by prohibiting it before viability." 109 S.Ct. at 3057.

The Court cited the dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 744, 106 S.Ct. 2169 (1986), with approval:

> "The State's interest, if compelling after viability, is equally compelling before viability." *Thornburgh* at 476 U.S. at 795, 106 S.Ct. at 2197 (White, J. dissenting).

The plurality opinion of Chief Justice Rehnquist in *Webster* was joined by Justices Kennedy and White. Justice Scalia wrote a concurring opinion which supports the conclusion. Justice O'Connor, on more than one prior occasion, concurred in this statement found in *Webster*. In 1983, she dissented in *Akron v. Akron Center for Reproductive Services*, 462 U.S. 416, 103 S.ct. 2481, noting that "The trimester system cannot be supported as a legi-

timate useful framework". *Akron, supra* at 454 (O'Connor, J. dissenting). In her dissent in *Thornburgh v. American College of Obstetricians and Gynecologists, supra* 476 U.S. at 814, 828, 106 S.Ct at 2206, 2213 Justice O'Connor expressed the same sentiment:

> "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466, 103 S.Ct. at 2507-2512. The State has compelling interests in ensuring maternal health and protecting potential human life, and these interests exist 'throughout pregnancy'." *Id.* at 461, 103 S.Ct., at 2509 (O'Connor, J. dissenting).

Thus, five Justices of the current Supreme Court no longer accept that portion of *Roe v. Wade* which found that a State did not have a compelling interest in protecting potential life in the first two trimesters of pregnancy. It also appears from the *Hodgson, supra* and *Ohio v. Akron Center, supra* decisions, that five Justices of the current Court no longer accept the *Roe* statement that a mother's abortion right is "fundamental". Consequently, neither the *Roe* principle that the State does not have a compelling interest in the life of the unborn child during the first two trimesters of pregnancy, nor the principle that the mother's right is "fundamental", are currently the law of the land. See, *Planned Parenthood of Southeaster Pennsylvania v. Casey*, 947 F.2d at 690 to 694

3rd. Cir. 1991. The consequence, when applying applicable case law of the United States Supreme Court to the current case, is that the unborn child enjoys protection under the due process and equal protection clauses. The interest of the State in protecting the child can only exist concurrently with the personal right of the child (see Brief submitted to State Courts, Appendix, Vol. II:54a to 82a). [43]

If the state has the power to protect the life of a person, the person must possess a corresponding right. The nature of the state's interest is its *parens patriae* jurisdiction. See *Santosky v. Kraemer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982) defining the state's interest in preserving and promoting the welfare of a child as part of its *parens patriae* jurisdiction.[44] When a state asserts the interest of the child, even fundamental Constitutional rights of a parent may be defeated. *Santosky v. Kraemer*, supra. But the *parens patriae* interest of a state cannot exist without a co-

[43] Ironically, despite New Jersey's misapplication of the appropriate case law in this case, the New Jersey Supreme Court, in dictum in an unrelated case, (on unrelated issues) reached precisely the same conclusion, stating:

> "The balance struck in *Roe v. Wade* recognizes increasing rights in the fetus and correlative restrictions on the mother as the pregnancy progresses." See *In the Matter of Baby M*, 109 N.J. 396, n.13 at 449. (emphasis added)

[44] *Parens patriae* refers to the role of a state as guardian of persons under legal disability. *Snapp v. Puerto Rico*, 458 U.S. at 600 (sc.8), 102 S.Ct. 3260

existing personal right of the individual being protected. C.f. *Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265. See, also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975)(drawing a distinction in how a state may protect an individual's interest compared to the individual's exercise of his rights.) *Raleigh Fitkin-Paul Morgan Mem. Hospital v. Anderson*, 42 NJ 421 (1964).

B. THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH THE CASE LAW OF THE UNITED STATES SUPREME COURT WHICH REQUIRES RECOGNITION THAT J.M., AS NATURAL GENETIC FATHER, HAS STANDING TO RAISE THE CONSTITUTIONAL RIGHTS OF HIS UNBORN CHILD, AND THAT J.M. POSSESSES HIS OWN FUNDAMENTAL RIGHTS.

The special relationship between J.M. and his child, based upon the fact that he is the natural genetic father, gives him standing to raise the interests of his child, and that standing is based upon the child's right to be represented, and J.M.'s own constitutional rights. That standing and J.M.'s rights are based upon the prior decisions of the U.S. Supreme Court.[45] J.M. and the child have

[45] *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, *Truax v. Raich*, 239 U.S. 33, 37 S.Ct. 7; *(standing, generally) Pierce v. Society of Sisters*, 268 U.S. 510, 485 S.Ct. 571 (standing, and the substantive constitutional right of J.M. to discharge his obligations and protect the life of his child); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982) (the fundamental right of the infant and that of the father to association and companionship); *Skinner v. Oklahoma*, 316 U.S. 535, 62 S.Ct. 1110 (1942) (J.M.'s fundamental right to procreate); *Stanley*

a constitutional right to the equal protection of the laws. *Shapiro v. Thomson*, 394 U.S. 618, 638 (1969); *Craig v. Boren*, 29 U.S. 109, 97 S.Ct. 451 (1976). See petitioner's development of these issues in his State Court Brief found in Appendix, Vol. II 83a to 101; Vol. II 130a to 143a; Vol. II 20a to 129a.7

Where the State of New Jersey does not exercise its power to protect the life of the unborn child, the child and his father are not helpless to exercise theirs. The child, if possessing protectable rights can only act under these circumstances through the father; thus denial of the father's access to Court, is a denial of the child's own rights. For his own part, the father has the right to assert his own interests, as well as those of his child.

C. NEW JERSEY MISAPPLIED PRIOR DECISIONS OF THE SUPREME COURT IN ANALYZING WHETHER THE RIGHTS OF J.M. AND THE CHILD OUTWEIGH ANY PRIVACY INTEREST OF V.C.

The New Jersey Supreme Court failed to properly apply prior decisions of the United States Supreme Court balancing the rights of the father, child and mother. Because J.M. possesses his own

v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) (J.M.'s right to association and companionship); *Planned Parenthood v. Danforth*, (dissenting and concurring opinions rith to association and companionship) 428 U.S. at 93, 96 S.Ct. at 2852.

constitutional rights and asserts those of the unborn child, V.C.'s privacy interests concerning the pregnancy would be outweighed by J.M.'s interest in protecting the life of his child (see State Court Brief found at Vol. II:102a-109a) *Cf. Nixon v. Warner Communications*, 435 U.S. 589, at 602-684, 98 S.Ct. 1306, 1314, 1315.

The interest and potential harms[48] to a mother were listed by the *Roe* Court: (1) maternity or additional offspring may force upon a woman a distressful life and future; (2) mental, physical health may be taxed by child care; (3) the stress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe v. Wade*, 410 U.S. at 153, 93 S.Ct. at 727. That these are legitimate concerns that implicate the right of privacy, there can be no doubt. But they do not outweigh the father's interest and that of the child to protect the life of the unborn child, or the rights of J.M. himself. These are only reasons to avoid a pregnancy in the first place; not a reason to take the life of a human being. It is a well established right of a woman and couples to prevent pregnancy and State action which would interfere with that right is unconstitutional. See *Griswold, supra*. The

[48] Where a mother's life is not at stake and pregnancy is not the result of rape.

balancing of the interests of the child and father against those of the mother can be accomplished only by preserving the life of the child.[47] To declare the mother's rights superior would frustrate, completely, the rights of both the child and the father with the worst possible consequence to both. Allowing the child to live does not frustrate the stated interests of the mother as set forth in *Roe v. Wade*, in circumstances where: (1) the life of the mother is not in danger; and (2) the pregnancy was the result of voluntary conduct on the part of the mother and therefore it cannot be said that she was denied her *Griswold* rights.[48] A state's interest and therefor the father's interest and that of the child, to preserve the child's life would prevail over those of the mother.

[47] Once the dispute was before the New Jersey courts, the court was bound to protect the constitutional rights of the child and father. *See, Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 845 (1948) ("...judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy"); *Bell v. State of Maryland*, 378 U.S. 226, 308-309, 84 S.Ct. 1814, 1859 (1964) ("a state applying its statutory or common law to deny rather than protect the right of access to public accommodations has...denied the constitutions by intended equal protection).

[48] See, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494, 95 S.Ct. 1029, 1046 (1975).

Respectfully submitted,

CASSIDY, FOSS & SAN FILIPPO

HAROLD J. CASSIDY

APPENDIX

This complete list of citations comprises 173 cases in which the U.S. Supreme Court has overruled a prior decision of constitutional law.

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United Staes v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constir. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920);

Erie R.R. Co. v. Szary, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling

Evans v. Gore, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City*

of New York v. Miln, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling

United States v. MacIntosh, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949)

(overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

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87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

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96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

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125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

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128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.S. 199 (1952)).

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130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

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133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

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135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

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141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

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154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 .Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

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166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

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171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).

(2)

91-2084

No.

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., individually,

Petitioner,

-against-

V.C.,

Respondent.

PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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JOHN DOE, a fictitious name of a real person, individually; JOHN DOE, a fictitious name of a real person, guardian ad litem for his unborn infant child, Plaintiff, vs. JANE ROE, a fictitious name of a real person; XYZ ABORTION CLINIC, INC. a fictitious name of real corporation doing business in the State of New Jersey; JOSEPH BLOW AND RICHARD ROE fictitious names of real individuals who are employees and agents of the defendant Corporation, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 Civil Action VERIFIED COMPLAINT

John Doe, a fictitious name of a real person, by way of Complaint against the defendants, says:

FIRST COUNT

1. John Doe, a fictitious name of a real person whose identity is disclosed in an affidavit filed with the court under seal, is a 38 year old man who resides in Monmouth County, New Jersey. Jane Roe, a fictitious name of a real person whose identity is disclosed in an affidavit filed with the court under seal, is a 32 year old woman who resides in Monmouth County, New Jersey. XYZ Abortion Clinic, Inc., a fictitious name of a real corporation doing business in the State of New Jersey, is a corporation which maintains facilities for medical procedures which include abortions, and is located in Monmouth County, New Jersey. The defendants Joseph Blow and Richard Roe, fictitious names of real persons, are employees and agents of XYZ Abortion Clinic, Inc., both of whom assist, direct and perform abortions at the location for XYZ Abortion Clinic, Inc.

2. In July of the year 1991, the plaintiff John Doe met the plaintiff Jane Roe and shortly thereafter started dating. In September of 1991, the plaintiff first proposed marriage to the defendant, Jane Roe, who advised the plaintiff that she would

consider marriage but it was premature at that time. Thereafter, Mr. Doe and Ms. Roe continued to date and their relationship grew. The plaintiff maintains that he loves the plaintiff Jane Roe and she has expressed similar feelings and emotions for him. In January of 1992 the defendant Jane Roe became pregnant with a child father by the plaintiff, John Doe. In February of 1992 Ms. Roe suspected pregnancy and personally performed a test which proved positive for pregnancy. She so advised the plaintiff and a repeat test was done while he was present. That test was also positive.

3. Upon initially hearing of Ms. Roe's pregnancy, the plaintiff was exhilarated and happy. He expressed optimism about the joy that they would derive from the two of them forming a new family. The plaintiff immediately proposed marriage and expressed his desire to assist in the rearing of the child. The defendant, Jane Roe, advised the plaintiff that she believed that she wasn't prepared to rear the child at this time and was considering an abortion to terminate the life of the child.

4. The plaintiff John Doe has continually advised the defendant, Jane Roe that he is prepared to marry her and live up to his obligations as father to the child. He has also advised her

that in the event she could not feel able or was unwilling to rear the child that he would do so without her assistance. On Monday, March 2, 1992, the defendant Jane Roe went to a doctor located in Monmouth County, New Jersey. Subsequent to her visit, she advised the plaintiff that the doctor confirmed that she is pregnant and that the unborn child is approximately eight weeks post conception. The plaintiff has continued to counsel defendant Jane Roe and advised her that he offers support for her and the child in any way necessary.

5. On Wednesday, March 4, 1992, defendant Jane Roe advised the plaintiff that she had determined with certainty that she would seek an abortion. She has continuously and at all times acknowledged that the plaintiff was the father of her unborn child. On Wednesday, March 4, 1992, the defendant Jane Roe advised the plaintiff that she scheduled an abortion for the morning of Wednesday, March 11, 1992 at a location in Monmouth County owned, controlled and operated by the defendant XYZ Abortion Clinic, Inc. and its agents and employees.

6. The plaintiff has a legal and moral obligation to discharge his duties to his unborn child. During the week of March 2, 1992, the defendant Jane Roe advised the plaintiff that she thought that

it was an equal obligation that they share the cost of the abortion. The plaintiff, a Catholic, has a deep belief that he has a moral duty to avoid in assisting in the termination of the life of his own child. He further holds a religious belief that he has a moral obligation to do what is necessary by way of affirmative action to care for, nurture and preserve the life, welfare and best interests of his unborn child. He therefore advised the defendant Jane Roe that he could not in good conscience spend money to terminate the life of his child. He believes that it is his obligation to pay considerably larger sums of money to preserve the life of his child and therefore he began to seek counsel on Thursday, March 5, 1992. On March 6, 1992, he contacted the attorneys of record and retained their services, the following day, Saturday, March 7, 1992.

7. As a matter of fact, the plaintiff's child fathered with the defendant, Jane Roe, is, at the age of eight weeks, a complete living human being at early stages of development. The unborn child is a member of the human race, is a human being and is a person. The unborn child has been and is currently a separate human being from his or her mother, with a complete and separate identity. The unborn child enjoys constitutional protection under the Fourteenth Amendment of the Constitution of the United

States and Article One of the Constitution of the State of New Jersey. As natural father, the plaintiff is acting as the guardian ad litem of his unborn child. The State of New Jersey, which licenses, regulates and supervises the medical activity at and on the premises of the XYZ Abortion Clinic, Inc., licenses, regulates and supervises the nurses and doctors at XYZ Abortion Clinic, Inc., would deprive the plaintiff's child of his or her constitutional rights if the state fails to intervene at the request of the plaintiff by denying the injunction he seeks.

8. The plaintiff, as father of his child, possesses a constitutional right to continued companionship with his child, has a constitutional right to procreate, has a constitutional right to discharge his obligations to his child. In addition, the plaintiff has the constitutional right to freedom of religion, the freedom to exercise the religion as he sees fit as long as it doesn't interfere with the legitimate rights of the state, his child and the child's mother.

9. The unborn child has the constitutional right to life both under the State Constitution and the Federal Constitution. The plaintiff has both the legal and moral obligation to protect the child's life and has the constitutionally protected right both under

the Fourteenth Amendment and the State Constitution to defend the life of his own child. The failure of the State of New Jersey to enter injunctive relief preventing the taking of the life of the plaintiff's unborn child, would be a constitutional deprivation of both the rights of the father and the child.

WHEREFORE, the plaintiff demands judgment on this count against the defendant, Jane Roe as follows:

a. Enjoining her from seeking an abortion anywhere in the State of New Jersey until further order of the Court;

b. Enjoining her from taking any action directly or indirectly aborting the child either individually or with the assistance of others in the State of New Jersey or elsewhere;

c. Enjoined her from leaving the State of New Jersey until further Order of the Court;

d. Enjoining her from disclosing her true identity or the identity of the plaintiff as long as the unborn child is alive or until further Order of the Court;

e. Or any other relief that the court deems just.

SECOND COUNT

1. The allegations contained in the First Count of this Complaint are incorporated by reference as if set forth at length herein.

2. The defendants, XYZ Abortion Clinic, Inc., Joseph Blow and Richard Roe, individually and in concert have arranged to have scheduled a medical procedure at the XYZ Abortion Clinic, Inc. hospital facilities on Wednesday, March 11, 1992 for the purpose of terminating the life of the plaintiff's unborn child. Their direct and indirect participation is material to the defendant Jane Roe's plan to terminate the life of the child she carries, fathered by the plaintiff.

WHEREFORE, the plaintiff demands judgment on this count against the defendant, Jane Roe as follows:

a. Enjoining each of them, their agents and employees from assisting Jane Roe in an abortion anywhere in the State of New Jersey until further order of the Court;

b. Enjoining each of them, their agents and employees, from taking any action directly or indirectly aborting the child either individually or with the assistance of others in the State of New Jersey or elsewhere;

c. Enjoining each of them, their agents and employees from disclosing the true identity of Jane Roe, or the identity of the plaintiff as long as the unborn child is alive or until further Order of the Court;

d. Or any other relief that the court deems just.

CASSIDY, FOSS & SAN FILIPPO
Attorneys for Plaintiff

BY: /s/ Harold J. Cassidy
HAROLD J. CASSIDY

VERIFICATION

1. I am John Doe, the plaintiff in the above entitled matter.

2. I have read the foregoing Complaint and on my own personal knowledge, I know that the facts set forth herein are true and they are incorporated in this certification by reference.

3. I certify that the above statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ John Doe
JOHN DOE, a fictitious name of a real individual whose identity is disclosed in an affidavit simultaneously filed with the Court and submitted under seal

DATED: March 8, 1992

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, Box 896
Red Bank, NJ 07701-0896
(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

Patrick J. Mullaney, Esq.
1 Madison Avenue
Morristown, NJ 07960
(201) 984-8777
Co-Counsel for the Plaintiff

JOHN DOE, a fictitious name of a real person Plaintiff vs. JANE ROE, a fictitios name of a real person, et al. Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. <u>Civil Action</u> CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF PLAINTIFF, JOHN DOE, IN SUPPORT OF APPLICATION FOR INJUNCTIVE RELIEF

John Doe, a fictitious name of a real person, being of full age, deposes and says:

1. John Doe is not my real name, but is a fictitious name that is being used for this law suit only. At the same time I file this certification, I file another certification which is submitted to the court in a sealed envelope which discloses my true name, present address, as well as the true name and address of the defendant named in this suit as "Jane Roe". I have filed an application with the court requesting that that particular certification be filed under seal and not be made part of a public record. Jane Roe is a

fictitious name of a woman that I have been dating since July of 1991. At the present time, she is eight weeks pregnant with my child. She has, under the circumstances described below, disclosed to me her intention to terminate the life of our child and the abortion procedure she seeks is scheduled for Wednesday, March 11, 1992. I seek to preserve the life of our child and ask the Court to enter an Order enjoining Jane Roe from submitting to the procedure and enjoining those employees of the stated hospital or abortion clinic from performing the abortion.

2. Firstly, I would like to comment on my beliefs concerning the importance of the preservation of the identity of Jane Roe. I seek to protect the identity of both the plaintiff and the defendants in this case for the best interests and well being of both Jane Roe and our infant child. For myself, my own privacy is not of importance. I ask that the court permit the suit to go forward in the name of John Doe, however, because I believe that once my identity is known the identity of my child and the baby's mother could be learned. I am advised by my attorneys that these pleadings are a matter of public record, and once in the public domain are discoverable by anyone who seeks them.

3. I am very concerned that Jane Roe's privacy and identity be kept anonymous. At the present time she is eight weeks pregnant with our child. I have offered to marry her and I have told her of my desire to fulfill my obligations as father, both in assisting with the raising of the child and in extending financial support, whether or not she decides to marry me. I am presently 38 years of age and Jane Roe is presently 32 years of age. However, I know that her decision to terminate the life of our child has been difficult for her. The plight of any unwed mother when she discovers she is pregnant is always one which requires compassion and understanding. This is particularly true with Jane Roe. I love her and I understand what a good person she is. I have no reason to believe that Jane is motivated by anything other than what is the right thing to do. I have expressed my beliefs at what is right and she has shared her thoughts with me. We are in disagreement. I do not believe it would be right for me or anyone else to deliberately make her circumstances more difficult than they currently are. I recognize that as the mother who is carrying the child she is in a different position that I am and the decision making process concerning the future life of our child may be more difficult for her. I ask that the Court honor my request that her

true identity as contained in my other certification that I filed with the court in a sealed envelope, not be disclosed. I also ask the court to take whatever steps that are necessary to see that other's don't disclose her name. This is not only for her sake but for the sake of our child.

4. I truly believe that it is important for our child that the fact of this law suit is never known by him or her. I hold out hope, and I possess a measure of trust, that this law suit may well result in saving the life of our unborn child. If that happy result is achieved, then I think it is important for the well-being of our child that he or she never know that this dispute took place. I fervently hope that Jane Roe voluntarily changes her mind, but if she does not and this suit is successful, in the long run I do not believe it is good for our child or Jane for the child to ever learn that the baby's mother intended to terminate his or her life. I therefore strenuously urge the court to do everything in its power to protect the identity of our unborn child. If it is necessary to protect my identity so it is not subsequently discovered, then I ask that the plaintiff's name be protected as well.

MY INTENTIONS AND THE RELIEF SOUGHT IN THIS SUIT

5. My purpose in filing this suit is to preserve the life of my child. I believe that that is both my legal and my moral obligation. Once our child's life is out of danger, I would seek to fulfill my obligations to my child. I shall live up to my financial obligations and shall take the responsibility of being a father to our child, whether or not Jane ever agrees to marry me. As far as my parenting role in the life of the child is concerned, it in large part depends upon Jane's wishes. I have been advised by my attorney that if Jane gives birth to our child, under existing New Jersey Law, and the circumstances of this case she essentially has the right to choose to be the primary custodian if we are not married. If Jane chooses to be the primary custodian of the child, I would respect her wishes and do the best job I can as a father in whatever role I can play within the limits of the court's permission. In the event Jane chooses not to be the primary custodian of our child, I would be more than delighted to fulfill that role. Naturally, I would welcome the circumstance in which both Jane and I can raise the child together. If I am not the primary custodian of the child, it is my intention to live up to my financial obligations as well as my obligations as a father.

6. In the current lawsuit, I seek to preserve the child's life. I have been advised by my counsel that a suit dealing with the custodial arrangement of the child (if a dispute were to arise) would wait until it has been determined if the child's life has been preserved.

BACKGROUND

7. Both Jane and I have had first marriages and both of us are divorced. I started dating Jane in July of 1991. Over the past year we have both expressed love and affection for one another. Even prior to the conception of our child eight weeks ago, we discussed marriage.

8. When Jane first told me that she was pregnant in February of 1992, I was very excited. Obviously we did not plan this pregnancy, but when I learned that I would become a father at the age of 38, I was overjoyed. The news, to me, was wonderful and caused not only joy, but celebration. I discussed marriage with Jane, but she expressed confusion and doubt. She didn't know if she was ready to raise the child and commit to marriage and motherhood. I love Jane and I have done the best I could to understand her feelings and the position she is in. I know that she faced, for her, a very difficult decision. If Jane actually obtains the

abortion, she may regret it the rest of her life. Whatever legal and moral rights she may have, she must make the decision for herself. What I seek to do in this suit is not to make decisions for her, but to exercise what I perceive to be my own fundamental obligations to my child, and obligations to myself. Whatever legal and moral rights she may have, they can only be viewed in the context of the consequence of her act upon our child and also on my own rights and obligations. I don't wish to denigrate her concerns she may have. When balanced, however, I believe that her concerns are far outweighed by the considerations of the loss of our child's life and the denigration of my own rights and perhaps, the denigration of my own sense of duty and sense of obligation.

MY DECISION TO FILE THIS SUIT

9. It was on Wednesday, March 4, 1992 that Jane told me with certainty that she would seek an abortion. Until that time I had believed there was a chance that I could persuade her that we could raise the child and she should not do anything to jeopardize the baby's life. She told me that she made an appointment to have the abortion and she gave me the identity of the clinic where it would be performed. She asked me to contribute to half of the costs of the abortion because "we are equally obligated." It was

on Thursday, March 5, 1992 that I decided to seek legal counsel. It was on that day that I made calls to secure an attorney and I retained counsel on Saturday, March 7, 1992.

10. My moral and legal obligations are clear. When Jane, without meaning any harm or hurt, suggested that I pay for half the costs of an abortion, I realized that I am morally obligated to refuse to assist the taking of the life of my own child. I would prefer and feel required to expend greater sums of money in an effort to save my child's life, rather than spend a mere couple of hundred dollars to take that life.

11. I believe that I have a moral and legal obligation to take whatever legal action is necessary to save the life of our child. I am a Roman Catholic and I believe in many of the teachings of the Catholic Church. I believe that life begins at conception and we all have an immortal soul. I do not believe that I am free to think that the obligations to our child are that of the child's mother only. My responsibilities exist independent of hers and my obligations include not only to refrain from assisting in terminating the life of our child, but taking whatever action is appropriate and necessary to preserve the child's life. A failure to do so would be a failure to discharge my legal and moral obligations. The beliefs that I

espouse in this particular paragraph are part of my religious beliefs and I believe that I will be held accountable if I do not discharge these obligations in a fair way.

12. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ John Doe
JOHN DOE, a fictitious name of a real person whose identity is disclosed in an accompanying affidavit presented to the court sealed.

CASSIDY, FOSS & SAN FILIPPO
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By: Harold J. Cassidy
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(201) 984-8777
Co-Counsel for the Plaintiff

JOHN DOE, a fictitious name of a real person Plaintiff vs. JANE ROE, a fictitios name of a real person, et al. Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. Civil Action CERTIFICATION IN LIEU OF OATH ___ OR AFFIDAVIT OF PLAINTIFF, J M , THE PLAINTIFF DESIGNATED BY THE FICTITIOUS NAME

J M being of full age, deposes and says:

1. My name is J M and I am 38 years of age. My social security number is . My current address is with my mother at , New Jersey . I recently sold my residence in Long Branch and since March 1, 1992, six days ago, I temporarily , New Jersey known as the . I have been in .

2. I checked into the because it is near and I wanted to be close to my girlfriend and the mother of my child and

this particular time. It was Monday, March 2, 1992 that a doctor confirmed that my girlfriend, designated Jane Roe in the caption of this suit was pregnant with the child I fathered.

3. The woman designated Jane Roe in this case is V C, who resides at , New Jersey.

4. I first learned that V was pregnant at the end of February. V had first performed a test that was positive. Then a test was conducted in my presence which was also "positive". It was at that time that I felt elated and expressed my desire to marry V . It wasn't until March 2, 1992 that V was at a doctor's office in F . I don't remember the doctor's name, but V told me that the doctor's test was positive and the doctor confirmed that the baby was eight weeks old. On Wednesday, March 4, 1992, V told me that she definitely made up her mind that she would have an abortion. She knew how strongly I felt, but for her own reasons she felt that the situation wasn't right. She told me that she had an appointment for Wednesday morning March 11, 1992 at an abortion clinic in , New Jersey. The name of that clinic is the and is located at , New Jersey. In my effort to keep V identity protected and for her sake as well as the sake of our child, I am

asking the court to seal this certification to protect even the name of the clinic. The Orders that I seek, if granted, should not contain the name of the clinic because I fear that V 's identity would be learned. For that reason, I have requested that the form of an Order for an Injunction include restraints against all involved from disclosing the identity of the unborn child's mother.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ J.M.
J M

Dated: March 8, 1992

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, Box 896
Red Bank, NJ 07701-0896
(908) 741-2525
By: Harold J. Cassidy
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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF HAROLD J. CASSIDY, ESQ. SUBMITTED UNDER RULE 1:4-4(c) (FACSIMILE SIGNATURE)

Harold J. Cassidy, being of full age, deposes and says:

1. I am an attorney at law of the State of New Jersey and a member of the firm of Cassidy, Foss & San Filippo and I am thoroughly familiar with the manner in which a certification was received from Dr. Jerome LeJeune from Paris, France.

2. The certifications in lieu of oath or affidavit that was submitted by Dr. LeJeune contained a signature which is a facsimile of the original signature.

3. This is to certify that Dr. LeJeune acknowledged the genuineness of the signature. I personally spoke to him on Wednesday morning, March 18, 1992. I certify to the court that if requested I shall secure an original signature from Dr. LeJeune. Naturally, there is a certain process and a certain period of time that this would take.

4. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Harold J. Cassidy
HAROLD J. CASSIDY

DATED: March 18, 1992

CASSIDY, FOSS & SAN FILIPPO
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(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

Patrick J. Mullaney, Esq.
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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF JEROME LEJEUNE

Jerome LeJeune, being of full age, deposes and says:

1. I am a resident of Paris, France. I am on the faculty of the Medical School at the University of Paris (France) and a professor at the Research Center of the Human Genetics and Brain Diseases, which has the following address:

Centre De Recherches
Genetique Humaine Et
Maladies De L'Intelligence

Institute De Progenes
45, rue des Saints-Peres
75270 Paris Cedex 06

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. All of the genetic information necessary and sufficient for a particular human being exists at the moment when the human life begins at conception. The life of each of us commences at the moment that the genetic information is complete and a unique individual is created. This event occurs when the head of the male sperm penetrates inside the female's ovum. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms.

4. The once held belief that a mother contributes to the make up of the child following conception is now known with certainty

to be false. Everything that is necessary to be a human being is present immediately after conception. Either the whole information is present for conception of a human being (and development to full stages of growth) at the moment after the entry of the sperm into the ovum or the genetic information is insufficient and no human being shall develop and conception will fail.

5. The completeness of the human being immediately upon conception is such that there is a specificity of both the species and the complete identity of the individual member within the species. Not only is it possible to identify the resultant cell after conception as being human in nature, the individual identity or person is known and can be identified. In each instance, this marvelous phenomenon at the moment of fertilization (conception) is a pure novelty which has never occurred before in the history of mankind: a new constitution of a personally devised constitution for a particular person. This new constitution is complete in all of itself which is capable of being identified, its genetic material being capable of being read and the makeup of chromosomes complete. We have, in short, a human being immediately after the moment of conception.

THE PROCESS OF FERTILIZATION

6. Just prior to conception there are thousands of sperm swimming around one single female egg and through the process of nature, one sperm is elected which will penetrate the egg or ovum. There is in this process of fertilization an extraordinary device employed by nature to protect the privacy of the life of the person immediately upon conception. The right of privacy is actually written into the law of nature. The egg, which is a little sphere of one and one-half millimeters in diameter, is protected by a transparent membrane which completely covers the egg. This membrane is known as the zona pellucida. Immediately upon a sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed. Within micro seconds it becomes completely impenetrable by any other sperm.

DNA AND THE SOURCE OF GENETIC INFORMATION

7. The necessary genetic information to create a human being is contained in DNA, a long thread molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put upon the point of a needle. These twenty-three pieces are chromosomes. The ovum also contains

twenty-three little chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the genetic make up. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable, so that the greatest computers cannot hold the amount of information which is inside one reproductive cell once fecundation occurs.

8. This process is like a tape recorder which plays music. If one places a mini cassette on which the music of an artist such as Mozart is recorded and put it in a tape recorder, you experience the sound of a symphony. The tape itself has no notes of music and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is being experienced by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father and which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous

amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony) but information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information.

THE RECENT DISCOVERY OF THE JEFFREY METHOD AND BAR CODE PERMITS IDENTIFICATION OF THE MEMBER OF THE HUMAN SPECIES IMMEDIATELY AFTER CONCEPTION AND SUPPORTS THE CONCLUSION THAT A HUMAN BEING EXISTS AT CONCEPTION.

9. Approximately four years prior to the trial in this matter a Englishman named Jeffrey made a discovery and developed a technique which has the capability of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes the DNA is repetitive. It can be repeated as much as one hundred times, so if harm is caused to some of the segments, some of the sequence will provide the genetic function and the human being will survive. In his work, Jeffrey developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffrey's technique has proven that

each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of the person being examined and is specific to the individual. That the identity of the person or the individualization of the member of the human race takes place at conception has been confirmed by the Jeffrey method.

METHYLATION OF CYTOSINE REPRESENTS A VERY RECENT DISCOVERY WHICH EXPLAINS THE SCIENCE OF GENETICS PREVIOUSLY UNKNOWN. IT SUPPORTS THE CONCLUSION THAT THE HUMAN BEING IS A COMPLETE PERSON AT THE MOMENT OF CONCEPTION.

10. Totally unknown as recently as four years ago (and unavailable when Roe v. Wade was decided) was the process of Methylation of Cytosine (which is contained on a piece of DNA). What has been learned is that the DNA is even more sophisticated than previously suspected and the messages are written "letter by letter", piece by piece. There is basic information with indications that some information must be read immediately and some information must be read at a later time. What is meant by the Methylation process is that everything to make this particular human being exists at fertilization, but is not read at the instant of conception. This discovery was never expected ten years ago and never predicted: that, in fact, the father's genes underline

instructions to immediately produce the membranes inside which the embryo will develop itself (its space capsule) and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm not in the mother's egg. The male genetic material therefore builds the membranes which becomes the shelter and the placenta which is the food gathering system. The female information acting in concert with the male information provides the mechanism for the development of the parts of the physical anatomy.

11. All of this information and the sophisticated directive mechanisms is contained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It can make "parts" such as skin, hair, teeth, some nervous cells, but not at all build a form and there will be no child. Essentially the same thing is true without the maternal nuclei. It will not form a human being. So it is absolutely required that, in the first cell, there be the DNA

underlined by Methylation in the male way and the DNA Methylation in the female way for there to be a human being.

12. The extraordinary observation made is that the only cell in all of the life of a person in which those two Methylation systems from father and from mother are present together inside one cell is in the very first cell which gives life to a person. At each progressive stage of development this Methylation is erased and replaced progressively as cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned that the male way of "spelling" is obligatory for muscles so that even in the female information which builds the muscles has to be underlined in the paternal way. This understanding contradicts any previous notions that fetal development occurs only through the mother. It is now clear that the child is a complete human being programmed for life from conception.

THE SCIENCE OF GENETICS IRREFUTABLY CONCLUDES THAT A FERTILIZED EGG, IMMEDIATELY AFTER THE MOMENT OF CONCEPTION, IS A MEMBER OF THE HUMAN SPECIES, IS A HUMAN BEING AND IS A PERSON.

13. To conceptualize the person at the age of eight weeks post conception, we should describe what the child looks like. The child was only the size of a person's thumb measured from its head to it's "rump", one inch. Inside the human embryology the child can be visualized as a tiny human being with fingers, toes, a face and palm prints that you could read with a microscope. You would be able to see the child's sex. The child has a heart beat and with the mother there are two rhythms between her heart and the child's which are detectable. The child's heart beats about one hundred and forty times a minute if it is a boy and about one hundred and sixty times a minute if it is a girl. An abortion of an eight week only fetus kills a member of the human species. That there is completeness of the human being and its identity as a person from the moment of conception when its chromosomal make up is complete not only as to the species but as to the individual member of the human race is irrefutable. There exists a specificity of the uniqueness of a human being at the beginning of life, at fecundation, at fertilization at conception.

14. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey,

Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Case and in opposition to a motion to vacate the restraints.

15. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Jerome LeJeune
JEROME LEJEUNE, M.D.

DATED:

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Co-Counsel for the Plaintiff

	:	SUPERIOR COURT OF NEW JERSEY
J.M., individually	:	CHANCERY DIVISION
and as guardian ad	:	MONMOUTH COUNTY
litem of his unborn	:	DOCKET NO. MON-C-66-92
unborn child	:	
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	
V.C.; W.M.C.;	:	
JOSEPH BLOW	:	
AND RICHARD	:	
ROE, fictitious	:	CERTIFICATION IN LIEU OF
fictitious names	:	OATH OR AFFIDAVIT OF
of real individuals	:	JEROME LEJEUNE
who are employees	:	
agents of the	:	
defendant	:	
corporation	:	
	:	
Defendants.	:	
	:	

Jerome LeJeune, being of-full age, deposes and says:

1. I am a resident of Paris, France. I am on the faculty of the Medical School at the University of Paris (France) and a professor at the Research Center of the Human Genetics and Brain Diseases, which has the following address:

Centre De Recherches
Genetique Humaine Et
Maiadies De L'Intelligence

Institute De Progenes
45, rue des Saints-Peres
75270 Paris Cedex 06

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. I incorporate by reference the testimony I gave in the matter of State v. Loce in this certification. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey, Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Cause and in Opposition to a Motion to Vacate the Restraints.

4. I certify to Judge McGann and the New Jersey Courts that the testimony that I gave in the matter of State of New Jersey v.

Alexander Loce, et al., which is attached to this certification, is truthful and accurate and I incorporate it by reference.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Jerome LeJeune
JEROME LEJEUNE, M.D.

DATED:

JEROME LEJEUNE, M.D., Ph.D., having been duly sworn according to law, testified as follows:

THE JUDGE: Doctor, I heard you pronounce your own name and we butchered it. So you may have a seat.

All right, you may proceed counsel.

DIRECT EXAMINATION BY MR. MULLANEY:

Q Doctor LeJeune, could you please for the record, state your name and how to spell it?

A Your Honor, my name is Jerome LeJeune.

Q We did butcher that one.

A Yes. I am a professor of fundamental genetics in the Children's Hospital of Paris and the Faculty of Medicine of Paris.

And I began as a pediatrician and then I became a geneticist. Now I am a pediatrician and a geneticist.

And in my consultation, which is probably the biggest in the world for mentally retarded children having difficulty due to a chromosomal mistake, we examine every year 2000 children, and we have record of 30,000 of them.

So our job is really to try to understand what makes the nature of every human being; why some of them are afflicted by constitutional difficulty, and to try later to treat that, if we can, so that we would be able to some day to bring them back to normal; and to give them what nature has refused to them.

Q Dr. LeJeune, could you please tell the Court a little about your educational background?

A As I staid I was MD and PhD, and have been always in Paris as a student.

And later when I finished by studying and I got my degree in medicine and genetics, I was representative of France in the United Nations scientific committee on the danger of atomic radiation, because I was a geneticist.

And in that function, international function, I came very often to the United States to go to the UN and I met one professor of California Institute of Technology.

And I was invited to give the first course of human genetics in Cal Tech because in his highly educated university they had not yet had any course of human genetics.

They had a lot of course in fundamental genetics. I was the first professor of fundamental genetics in Cal Tech.

Q As part of your serving on this committee, Doctor, did you have opportunity to go to the Kremlin in moscow and meet with Mr. Brezhnev?

A yes. That is as a geneticist, I was vice-president of the Genetic Congress in Moscow and I was known by my fellow professor of genetics in Moscow and because I am a member o the Pontifical Academy of Science and because I was a member of the, of a special group that we had to study of the dangers of atomic war I was sent by the Pope, John Paul II, to Moscow.

It was around three days after Mr. Jaruzelski had declared the war against people in Poland; in other words, declared a state of war against its own population.

And because we had prepared the reports about the dangers of -- as a specialist I was only speaking of the genetic dangers of the atomic war, then the Holy Father wanted me to be presenting a report to all the powers of the world who were having the atomic power.

And so some of us of the Pontifical Academy of Science went to America to see Mr. Reagan and some came to France or England to China and India. And I was sent by the Holy Father to see Mr. Brezhnev.

And it was a very curious situation. But I am not going to talk too much about that.

Q Dr. LeJeune, you have been credited with the first discovery of the first chromosomal abnormality in man.

Could you please tell the court about your discovery of Down's Syndrome?

A Yes. Down's Syndrome is a very peculiar disease in the sense that the baby who are born with it owe their difficulty to an excess of genetic material.

And it was long ago, nearly thirty years ago that I discovered that they had an extra chromosome and this chromosome is now known as number 21.

The classification of chromosome was not yet established at that moment because it was the first disease to be discovered to be due to this chromosomal defect.

And those babies, in fact, suffer because they have too much of those table of the law of the life which we call chromosomes.

And to make a very complex story short I would say that inside the chromosomes are written in a very special ribbon, which is DNA, all the tricks of the trade to be a human being, if those chromosomes are human chromosomes.

If they are chimpanzee chromosomes, all the tricks to be a chimpanzee are written.

Q Doctor LeJeune, we are trying to qualify you as expert at this point.

A Yes.

Q We will get into that in a minute. I have to cut you off because it's an interesting story. For your discovery of Down's Syndrome did you win any awards?

A Well, I had the honor or receiving the Kennedy Prize from the hands of the late president and, because of this discovery, and got also the William Allen Memorial medal in this country which is the highest prize that you can get in genetics in the world.

It is given by the American Society of Human Genetics in this country. I received it in San Francisco.

Q What year was that, Doctor?

A Oh, I am not good with the remembering the times. It was, if I'm correct, around '62 or '64. I think that the Kennedy Prize was '64.

Q Could you tell the court -

A That's -- I's sorry. I don't remember.

Q Could you tell the Court of any other boards or academies of which you're a member?

MR. BANGIOLA: I am prepared to stipulated the witness as an expert in genetics. Excuse me.

MR. MULLANEY: Your Honor, it is just not that often we get someone with the stature of Dr. LeJeune. But if the Court is willing to recognize him, I offer the Court Dr. LeJeune as expert in genetics and human reproduction.

THE JUDGE: And prosecutor is willing to stipulate that?

MR. BANGIOLA: Without objection.

THE JUDGE: The doctor who discovered Down's Syndrome is an expert in genetics.

MR. BANGIOLA: Doesn't seem like much of a stretch.

THE JUDGE: I will accept that stipulation and welcome you to the Morristown Municipal Court.

CASSIDY, FOSS & SAN FILIPPO
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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF BERNARD NATHANSON, M.D.

Bernard Nathanson, M.D., being of full age, deposes and says:

1. I am a doctor of medicine licensed to practice medicine in the State of New York. I am board certified in obstetrics and gynecology and I maintain my practice at 133 East 80th Street, New York, New York.

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony and some cross examination has been attached to another certification and submitted to the court in this case.

3. My understanding is that this affidavit is being used to support an application by the plaintiff in this case to restrain an abortion of his unborn child. I understand that this certification will be filed in opposition to a motion to vacate the restraints, and that this certification will be used in support of permanent restraints.

4. Current knowledge of modern medicine and its recent developments all support and are consistent with the conclusion that an individual member of the human race, one separate and apart from its mother, has a life immediately following conception.

THE ANATOMY OF THE FEMALE REPRODUCTIVE SYSTEM

5. The uterus, the key organ of the female reproductive system, is a pear shaped organ which has at its lower end the cervix. The cervix is a narrowing which resembles a "bottle neck".

It contains within it a cavity and is positioned above the vagina which is the lower most point of the female reproductive system.

6. At the top of the uterus on both sides are fallopian tubes. They function as a conduit for descending eggs from the mother's ovaries. The ovaries are located above and at the outer limits of the fallopian tubes on both sides. The function of the ovaries are to manufacture, or produce the female eggs or ova. The egg "pops" out of the ovary and is caught by the tube.

7. The fertilization of an egg actually takes place within one of the fallopian tubes itself, in an outer portion of it which is designated the "ampulla".

THE DEVELOPMENT OF THE UNBORN CHILD IN THE FIRST EIGHT DAYS OF LIFE

8. During the first eight days following conception, the unborn child develops additional cells, descends from the fallopian tube, burrows into the lining of the uterus and there is an "interfacing" of the child and mother's circulation.

9. It is while the child is in the early days of life that it (descriptively referred to as "the fertilized egg") begins to "divide" the numbered cells go from one to two, four, then eight and then

sixteen. When the development of the child reaches the sixteenth cell stage, the child is referred to by the biological term "morula".

10. At this stage of development, the unborn child is approximately three days of age and proceeds into the uterus where it continues to divide and develop. By the sixth day, the early human being is actually in contact with the lining of the uterus which is known as the endometrium period as the division progresses and the baby attaches to the uterine wall. The developing human being is within the form of a cell mass referred to as a "blastocyst", which actually is in contact with the uterine wall. At this point there will shortly be a recognizable unborn child and the outer layer of cells, which is referred to as a trophoblast, will form the placenta.

11. As the blastocyst burrows into the lining of the uterus it erodes the maternal blood vessels and nexus begins to form between the mother and the child resulting in an "interface" between the mother's circulatory system and that of the child. It is at this stage of development, eight or nine days of age following fertilization, that the unborn child is detectable within the mother through normal testing methods.

12. It is through the detection of a pregnancy hormone referred to as "beta sub unit HCG" that medical confirmation that there is a growing living human being within the maternal uterus is possible. During the first eight or nine days of the child's development this tiny member of the human race has exhausted its own stored up oxygen and nutrients. So at this age the bridge is established between the unborn baby and the mother and the baby begins to extract the nutrients and oxygen from her. In order to accomplish this link, the trophoblast (the outer layer around the blastocyst) actually scouts into the tissue of the uterus for blood vessels. The trophoblast has the power to open up maternal blood vessels which causes hemorrhaging around the baby. From the blood which is surrounding the child at that point the child begins to extract certain necessary nutrients, chemicals and even oxygen.

THE STAGES OF GROWTH OF THE UNBORN CHILD IS A SEAMLESS CONTINUUM FROM CONCEPTION TO BIRTH

13. The English language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. Consequently, there are terms to describe the particular "stages of growth". However, it was emphasized at trial that it is important for one to understand that

"stages of growth and development" of the new human being is really a "seamless continuum".

14. Immediately upon conception the "fertilized egg" has been referred to as a zygot. At the age of three days the child has developed from a single cell tc a sixteen cell individual termed "morula". The term "embryo" connotes the developing human being from the morulus stage to about the end of the eighth week following fertilization. The term "fetus" is used to describe the stage of the development of the human being from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth.

15. The terms zygot, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being. Development of the person from the moment of conception is "seamless" with continuing growth and aging of the person from the moment of conception.

TECHNOLOGICAL DEVELOPMENTS SINCE 1976 (THREE YEARS AFTER ROE V. WADE) HAS RESULTED IN GREATER KNOWLEDGE OF THE NATURE OF THE UNBORN CHILD IN THE EARLY STAGES AND HAS PERMITTED SOPHISTICATED

SURGERY ON CHILDREN ONLY FOUR AND FIVE MONTHS AFTER CONCEPTION.

16. There were crude ultrasound devices that were available in the early 1970's dating back to its development in the 1950's. These instruments permitted limited access to knowledge about the child during the early stages of growth following conception.

17. In 1976 there was a major development in technology called "real time ultrasound". Whereas the old technology showed static pictures, the new technology actually created a motion picture which could detect not only movement but function, breathing, urination, swallowing and other functions of the human existence. It became possible to trace the development of the unborn person from literally the very beginnings (at conception) all the way through the child's development up to its birth. This technology, currently in color, permits detection of such things as blood flow through a fetus and embryo. Doctors using the instrument can actually see the red blood on the screen itself as the vessels transmit the flow of blood through the child's circulation.

18. This level of visualization permits examination and diagnosis of the child's illnesses while in its mother's womb.

Medicine can watch how the child functions including such intricate detail as the operation of the tiny little valves and the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at the developmental stages of four and five months. It was not until 1990 that the first book was published describing this sophisticated fetal surgery in which the mother is anesthetized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while he or she is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and the mother repaired. The child is able to proceed through the pregnancy to, at or near full term. These operations are done at relatively early stages of development of the child.

19. In addition to the development, since Roe v. Wade, of the sophistication of ultrasound technology, medicine has developed the additional modality of the electronic fetal heart monitor which

permits sophisticated investigation of the fetus. The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music.

THE FUNCTIONING OF THE UNBORN CHILD AT EIGHT WEEKS OF AGE POST CONCEPTION

20. The child at eight weeks is a clearly recognizable human being even to the human eye. The child's brain has formed (the child's brain continues to form following normal birth all through childhood and adolescence). An important fact is that at eight weeks the brain is producing a substance, "substance P", which is the "chemical messenger for pain".

21. The child at the embryonic stage of development has arms, legs, fingers and toes which are separate and distinct. The child has a nose and an external ear and, as Dr. Nathanson put it, the child "is, in fact,...quite obviously one of us".

22. The child, in every way, is a human being that is very small in physiological terms. The child functions the same way that an adult human being functions. The child at that age excretes urine, and its heart beats regularly as it had been since the age of three weeks following conception. The blood is

circulating and brain waves have been isolated and detected for children which are eight weeks following conception. The child essentially does everything that an adult human being does but on a smaller scale.

DEVELOPMENTS IN IMMUNOLOGY DEMONSTRATE THE CHILD IS ALWAYS, THROUGHOUT ITS DEVELOPMENT FROM THE DATE OF CONCEPTION, A SEPARATE AND DISTINCT PERSON FROM THE MOTHER.

23. The pre-born child is always a separate person from the child's mother. Circulations are always separate and they never mix. In fact, if they do mix it can be lethal to the baby and even to the mother. Although the relationship is symbiotic and an important one, the child is a separate and distinct person and is not a part of the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from its non-self, the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize parts of the mother as being the same human body to which it is a part. It also distinguishes a body that is not part of itself. If a foreign-substance is put into a person's body the white blood cells will

recognize it and immediately attack it in an "attempt to throw it out". The foreign body is not self. When the pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old following conception), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body. Each one of us who were unborn babies have undergone this attack. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Graphically it stops the attack. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled which is the phenomenon that is referred to as "spontaneous miscarriages". A spontaneous miscarriage involves a person who is unborn but fails to survive the attack by the mother's immune system.

ONLY AFTER 1984, ELEVEN YEARS AFTER ROE V. WADE, DID MEDICINE UNDERSTAND THAT THE ABORTION OF THE UNBORN CHILD EVEN AT THE EARLY STAGES OF LIFE WITHIN THE MOTHER'S WOMB (INCLUDING AN EIGHT WEEK

OLD CHILD) INVOLVES A BRUTAL, VIOLENT AND PAINFUL DEATH OF A HUMAN BEING.

24. Mainly as a result of information learned during abortions that were performed after the Supreme Court decision in Roe v. Wade, it is now clear that the abortion of an unborn child, even at the early stages of the child's life following conception, involves a brutal, violent and painful death of a human being. It was not until 1984 that members of the medical profession began to document the abortion experience. In that year, Dr. Bernard Nathanson commissioned a doctor who was performing a legal abortion at a clinic to perform the abortion under ultrasound with the modern technology then available. During one day's work the commissioned doctor taped the ultrasound abortions of twenty-five to thirty human beings. A vivid depiction of one of the abortions was incorporated into a film entitled "The Silent Scream". As a result of the use of this technology in the taping of the abortion it is documented that the unborn child is moving around in the womb in the embryonic fluid. We now know from this technology that the unborn child begins to move within the embryonic fluid at the age of eight weeks.

25. In the abortion process the doctor puts an instrument into the womb to dilate the cervix. The doctor breaks the water and the embryonic fluid is permitted to flow out. Then the doctor uses a suction apparatus into the uterus. On the film it can be seen that the baby moves away from the suction apparatus. After the baby moves from the apparatus, the suction is turned on and a tremendous negative force is used to pull the baby from its living quarters.

26. In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart.

27. In this specific abortion filmed in 1984, the head of the baby was too large to be suctioned out so the doctor had to take a metal instrument called a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around the baby's head and then close the forceps. The film reveals that the child's head is actually crushed in the process. It was not until 1984 that there was a reliable documentation of what actually occurs in abortion.

28. I performed or supervised seventy-five thousand abortions. These abortions were performed when this technology was not

available (before 1972). During an abortion a human being's life is terminated.

29. It is now clear that as a matter of fact, the abortion of an unborn child in its mother's womb subjects a human being to "unimaginable agony" and it ends the life of a person in the most barbaric and bloody manner possible.

30. The unborn child's death and the pain to which it is subjected is documented in the movie "The Silent Scream". In the film it can be seen that the mouth of the young unborn baby is open. It is a dramatic, an arresting moment - a heart stopping moment - because it can be detected that the child was grimacing and was evidencing the most unimaginable agony that one can envision.

31. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Bernard Nathanson
BERNARD NATHANSON, M.D.

DATED:

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, Box 896
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(908) 741-2525
By: Harold J. Cassidy
Attorneys for the Plaintiff

Patrick J. Mullaney, Esq.
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(201) 984-8777
Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 CIVIL ACTION CERTIFICATION IN LIEU OF OATH OR AFFIDAVIT OF BERNARD NATHANSON, M.D.

Bernard Nathanson, M.D., being of full age, deposes and says:

1. I am a doctor of medicine licensed to practice medicine in the State of New York. I am board certified in obstetrics and gynecology and I maintain my practice at 133 East 80th Street, New York, New York.

2. On April 13, 1991 I testified in the Municipal Court in Morristown, New Jersey, in the matter of State of New Jersey v. Alexander Loce, et al. The testimony in that case has been memorialized in a transcript. The portion of the transcript that contains my direct testimony is attached to this certification.

3. I incorporate by reference the testimony I gave in the matter of State v. Loce in this certification. I understand that this certification is being submitted in the New Jersey Courts in a law suit entitled J.M. v. V.C., W.M.C., et al., currently pending in the Superior Court of New Jersey, Chancery Division, before The Honorable Patrick J. McGann, J.S.C. I understand that this case is a civil action brought by the father of an unborn child seeking to enjoin an abortion. It is to be made part of the record on an Order to Show Cause and in Opposition to a Motion to Vacate the Restraints, and in support of an application for a permanent injunction.

4. I certify to Judge McGann and the New Jersey Courts that the testimony that I gave in the matter of State of New Jersey v. Alexander Loce, et al., which is attached to this certification, is truthful and accurate and I incorporate it by reference.

5. I hereby certify that the foregoing statements made be me are true. I am aware that if the foregoing statements made be me are wilfully false, I am subject to punishment.

/s/ Bernard Nathanson
BERNARD NATHANSON, M.D.

DATED:

BERNARD NATHANSON, M.D.

having been duly sworn according to law, testified as follows:

THE JUDGE: With respect to the speaking and movement in my courtroom, this is a court of law. It looks like someone's den with the fireplace, but it is a court of law.

I expect silence so we can hear the testimony, the direct examination and cross-examination.

All right, you may begin, counsel.

DIRECT EXAMINATION OF MR. TRAYNOR:

Q Doctor Nathanson, please state your full name and your address.

A Bernard N. Nathanson, M.D., 133 East 80th Street, New York, City.

Q And, Doctor, where are you licensed to practice medicine?

A In New York and Pennsylvania.

Q What is your educational background?

A I was educated at Cornell University. I then went to the McGill University Medical College in Montreal, Canada.

Q What degree did you receive from Cornell University?

A I did not receive a degree. It was pre-medical education. I received a degree of M.D. at McGill in 1949.

Q And did you do any post-graduate medical training?

A Yes I did. I had a year as a rotating intern at the Michael Reece Hospital in Chicago, a years as an assistant resident in surgery at the New York Hospital Cornell Medical Center; four years of residency in obstetrics and gynecology at the Woman's Hospital in New York City.

That residency was interrupted by two years of service in the U.S. Air Force, during which time I was chief of obstetrics and gynecology in the Northest Air Command.

And after this rather lengthy period of training and service, I entered the private practice of obstetrics and gynecology in New York City at the end of 1957, substantially older than I was when I started.

Q Doctor, what is your specialty?

A Obstetrics and gynecology.

Q Doctor, do you have a board certification?

A I do.

Q What is that?

A I was certified by the American Board of Obstetrics and Gynecology in April 1960.

Q Do you have any hospital affiliations?

A I do.

Q And those are?

A I am senior attending obstetrician and gynecologist at the Saint Vincent's Hospital Center which is part of the New York Medical College.

I am senior obstetrician and gynecologist at the St. Luke's Roosevelt Hospital, which is part of Columbia University College of Physicians and Surgeons.

I'm associate attending obstetrician and gynecologist at the New York Hospital Cornell Medical Center.

And I was chief of the obstetrical service at the St. Lukes' Hospital for a period of five, for or five years, from 1973 until the end of 1977.

Q Do you have any professional associations?

A I do.

I am a member of the American Medical Association, the New York State and County Medical Societies.

I am a fellow of the American College of Surgeons.

I am a fellow of the American College of Obstetricians and Gynecologists; and a very lengthy list of really quite minor, other organizations.

Q Have you published any writings in your field?

A Yes, I have.

Q Could you give us some of those?

A I published, I believe, 15 or 16 scientific articles, several books, and assorted other material in the area of bio-ethics especially.

Q Have you published in the area of fetal development and embryology and fetology?

A Yes, I have, and I have also lectured on this in respect to my academic appointments.

Q Have you received any awards or honors in your field?

A Well, yes. I have been appointed assistant or clinical assistant professor of obstetrics and gynecology at the Cornell University Medical College which I currently hold.

I also hold a professorship at the New York Medical College where I am clinical associate professor of obstetrics and gynecology.

So I have professorships at two universities.

MR. TRAYNOR: I offer the doctor as an expert witness in the field of obstetrics and gynecology.

THE JUDGE: Any objection?

MR. BANGIOLA: No objection.

THE JUDGE: All right, the doctor will be accepted as an expert in obstetrics and gynecology.

You may proceed.

BY MR. TRAYNOR:

Q Doctor, in addition to indicating your training in your chosen field, do you have any training in abortion procedures and any practice, any experience in that practice?

A Yes, I have -- and I say this immodestly, but I probably have more experience in the area of abortion and abortion technology than perhaps anyone in this country, owing to the fact that I was the director of the largest abortion clinic in the United States for a period of two years; and published early on in the medical literature, scientific papers on techniques of abortion, ambulatory abortion technology, complications of abortion, and a whole range of issues dealing with abortion and satellite issues.

Q Thank you, Doctor.

Doctor, would you describe the anatomy of the female reproductive system?

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Co-Counsel for the Plaintiff

J M , individually as guardian ad litem of his unborn child Plaintiff, vs. VC; WMC; JOSEPH BLOW RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation Defendants.	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

THIS MATTER having been opened to the Court by Cassidy, Foss & San Filippo, Harold J. Cassidy, Esq., appearing, and Patrick J. Mullaney, Esq., attorneys for the Plaintiff, and the Court having reviewed the Plaintiff's Verified Complaint, the Certifications, the sworn testimony presented, Plaintiff's Brief and the arguments of Plaintiff's counsel; and the Court having determined for good cause

showing that: (1) it clearly appears from the specific facts shown by the sworn testimony and the Verified Complaint that the Plaintiff is the unwed natural father of an unborn child; that the Defendant, V C is the unwed mother of that unborn child; that the Defendant has been pregnant for approximately eight weeks; that the Defendant V C intends to abort her pregnancy without the consent of the natural father on or about March 11, 1992; that the Plaintiff, the natural father opposes the abortion of the unborn child and wishes to raise and support the child; that the Plaintiff wishes to assert his rights as the natural parent of the child; that the Plaintiff, as the natural parent, wishes to assert the rights of the unborn child; and therefore, that immediate and irreparable harm will result to the Plaintiff; (2) Plaintiff has demonstrated a substantial likelihood of success on the merits; (3) Plaintiff has demonstrated that any harm to the Defendants resulting from the imposition of the temporary restraints requested by Plaintiff is outweighed by the harm which would result to the Plaintiff if such restraints were not imposed; and (4) the imposition of the temporary restraints against the Defendants does not contravene the public interest;

IT IS on this ____ day of March, 1992 at ___ A.M.

ORDERED that Plaintiff's application for a temporary restraining order shall be and hereby is granted as follows:

A. Defendant V C is hereby prohibited and enjoined from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Defendant WMC , Howell, New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

C. Each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C

or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

IT IS FURTHER ORDERED that on forty-eight (48) hours' notice to Plaintiff's counsel, Defendants may appear and move the dissolution or modification of this Order; and

IT IS FURTHER ORDERED that the restraints imposed by this Order shall expire on the day of 1992 at 12:00 P.M., unless extended by further order of this Court; and

IT IS FURTHER ORDERED that the defendants are enjoined from disclosing, directly or indirectly, the identity of the plaintiff, John Doe, and the true identity of Jane Roe, and Ordered to take all reasonably precautions to prevent an inadvertent disclosure of them; and

IT IS FURTHER ORDERED that V C is enjoined from leaving the State of New Jersey for the purpose of terminating the life of her unborn child; and

IT IS FURTHER ORDERED that the Defendants or their attorneys show cause before this Court at the Superior Court of New Jersey at the Monmouth County Court House in Freehold, New Jersey, on March __, 1992, at __ o'clock P.M., why an Order should not be entered:

A. Permanently prohibiting and enjoining Defendant VC from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Permanently prohibiting and enjoining Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C;

C. Permanently prohibiting and enjoining each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C: and

IT IS FURTHER ORDERED that this order shall not be disclosed or revealed to anyone other than defendants counsel where the names of the parties are visible or revealed; and

IT IS FURTHER ORDERED that Defendants file an Answer to the Plaintiff's Complaint, and submit any briefs and/or certifications or affidavits in opposition to the above relief, not later than March __, 1992, and that Plaintiff submit any reply briefs and/or certifications or affidavits not later than March __, 1992.

/s/ Patrick J. McGann, Jr.
J.S.C.

ORDER ON EMERGENT APPLICATION

JOHN DOE, a fictitious name of a real person, individually; JOHN DOE a fictitious name of a real person, guardian ad litem for his unborn infant child

vs.

JANE ROE, a fictitious name of a real person, et al.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
MOTION NO.
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: March 13, 1992 BY: Cassidy, Foss & San Filippo AND Patrick J. Mullaney, Esq.

ANSWER(S) FILED: BY:
BY:

APPEARANCE ONLY: BY: Harold J. Cassidy, Esq.

DATE ARGUED: March 13, 1992

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 13th DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO APPEAL AND TO PROCEED WITH FICTITIOUS NAMES	GRANTED	DENIED	OTHER
	X		X

SUPPLEMENTAL: The parties to this action, their representatives, and the court shall use the initials of the parties and not their full names or other means of identity. The real names of the parties shall be maintained as a sealed record of the court. The order of the Chancery Division dated March 9,1992 is hereby summarily reversed.

FOR THE COURT:
/s/ Thomas F. Shebell, Jr.
THOMAS F. SHEBELL, JR., J.A.D.

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By: Harold J. Cassidy
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Co-Counsel for the Plaintiff

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MONMOUTH COUNTY
DOCKET NO. MON-C-66-92

J.M., individually and as guardian ad litem of his unborn unborn child
Plaintiff,

vs.

V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation

Defendants.

TRANSCRIPT OF

ORDER TO SHOW CAUSE

DATE: March 19, 1992
PLACE: Freehold, New Jersey

B E F O R E:

THE HONORABLE PATRICK J. McGANN JR., J.S.C.

APPEARANCES:

Harold J. Cassidy, Esq. (Cassidy, Foss & San Filippo) and
Patrick J. Mullaney, Esq.
Attorneys for the Plaintiff J.M.

Lewis H. Robertson, Esq. (Evans, Osborne & Kreizman)
Attorneys for the Defendant V.C.

JAMES V. OVERBY, C.S.R.
OFFICIAL COURT REPORTER
MONMOUTH COUNTY COURT

HOUSE

FREEHOLD, N.J. 07728
LICENSE #XI00692

father's rights because the child would have a right to live on is own.

THE COURT: I don't know whether again we're doing a little bit of a dance here just to have him sit around and make him feel good.

I've already indicated that somebody is going to be a guardian ad litem. It doesn't make any difference to me if he is because who is going to be the somebody it's the lawyer that's going to do the work.

MR. MULLANEY: Thank you, your Honor.

THE COURT: Let's get to Mr. Robertson.

MR. ROBERTSON: As I understand, the court wishes me to address the father.

THE COURT: Just the father individually.

MR. ROBERTSON: I'll be very brief and very summary. First of all, of course we're in a trial court bound by applicable precedent.

Secondly, it's dangerous to divorce holdings from their facts because the facts give rise to the policies that were considered in order to lead to the holdings and all the cases that

were cited for the proposition that the father has a right because of companionship, his right of procreation, his right to discharge his duty to his child and perhaps an Article I right.

The courts were dealing with a personal being and here there is no personal being. And I think that a totally different consideration would operate were a court in proper circumstances to analyze the father's standing.

I suggest that thee has been no case cited in any jurisdiction at least in an appellate court where a father in circumstances such as these has ever been held to have standing.

And for those reasons again, in summary fashion, the father has no standing.

THE COURT: I'll grant the motion to dismiss J.M. as a party plaintiff and I'm satisfied that that's the proper thing to do. All of the cases in which the issue has arisen in the past have been husband type cases and those cases, of course, have an additional element to them and that is, in a sense the contractual agreement between husband and wife in which we're partners in this whole idea of marriage, whole idea of procreation and because I'm your

partner, I have something to say about what occurs during our marriage.

Even in those cases, husbands have not be afforded standing. This is one step removed from that and aside form the genetic connection and aside from the fact he's interested as a person because of the relationship that he had with the person who now bears the unborn, that's not any sort of a constitutional basis.

The constitutional rights alleged in his behalf or as Mr. Robertson says, rights that courts have talked about in connection with children who are available, my expression, for hugging. That's the context in which those cases went forward and not in this context at all.

So I will grant the motion to dismiss J.M. as an individual plaintiff.

The second argument, I think is Mr. Robertson's to carry because he thinks the whole complaint ought to be dismissed.

MR. ROBERTSON: Thank you. I'd like to again point out to the court that the circumstances presented here ar relatively simple and I think the issue is relatively simple too. We have an unmarried woman in her first trimester of pregnancy.

She's elected to have an abortion. She doesn't seek to have the state pay for it. She doesn't seek to have the state provide the facilities in which the abortion is to take place.

There is no state Statute which prohibits it. There is no decision, at least of a New Jersey Supreme Court, that is the Supreme Court or an appellate court that has construed the New Jersey Constitution as prohibiting it in circumstances such as these.

All that stands in her way at this point is there

precedent and there is no precedent for the proposition that a fetus is protected by the 14th amendment.

But there are cases which hold to the contrary. Any my point is simply that we must apply those precedence and that should lead to dismissal of the complaint and dissolution of these restraints.

THE COURT: It seems to me that the judicial resolution aside from all of the arguments is the resolution that should be designated on the return date of an order to show cause as to whether or not certain temporary restraints should be continued as an injunctive order.

The injunctive order is effectively to V.C. don't abort that, I'll say fetus because that's a neutral term. Should that injunction continue to remain in place.

That depends on whether or not we have a lawsuit because if I do not appoint a guardian ad litem or say to J.M. that while you designate yourself guardian ad litem of the unborn, that's not real.

If I don't do that, then we have no case and if we have no case we have no injunction. It's true that the U.S. Supreme Court has not ruled on the issue at least in Roe v. Wade, it doesn't.

It specifically left the field open. It decided not to get involved in the field and the language that it used, maybe it's language that now some nineteen years later, it's easier to question it but when you read the language, it doesn't sound terribly judicial.

"We need not resolve the difficult question of when life begins." Well, if you say that, then you never get into the question of personhood and you never get into the question of constitutional protection.

Whatever life is there in V.C., right there, if it is life, whatever is there in V.C. if the normal nine month term comes to pass and if there is no abortion involved, voluntary abortion in the meanwhile, miscarriage, a baby will be born, male or female and get a name.

And from then on be known as Mary Jones. We don't apply the name Mary Jones to what is becoming Mary Jones, we say only when the birth process take place, only when he slaps the baby's bottom, cut the umbilical cord, then Mary Jones is okay.

Arguments that are presented by way of the affidavit submitted by Drs. LeJeune and Nathanson say that it's Mary Jones right from the moment of conception. It doesn't have a name; but from the time of birth it's going to be Mary Jones from the time it dies and birth is just one intervening step almost like going to high school, maybe, during lifetime. It's a step along the way of life.

Now, that's what they say. And on a reading by an unlettered person in the medical field such as myself and I'm not deprecating, that's the truth, on the reading what they say and according to their expertise which I don't have, they say life is life.

That it begins the moment of conception and goes on until death is declared. Now, we have spent a great deal of time in figuring out when people are dead. We find that the legislature passes an act which defines when death occurs.

The legislature hasn't passed an act defining when life occurs. But the fact that we address the problem, legislature having on one end a lot of court cases which had to do with defining when death occurred too where the legislature acted, which is not something unusual that courts have to act first.

But we have spend a lot of time on that, w in this state, and I think most states do claim we are protective of life and we

are. I think in the cases with the children in the hospital, children of Jehovah's witnesses, child need blood transfusion, simple thing.

Parents say no, we can't do that, against our religion. The courts say you keep your religious beliefs, we're interested in the child's rights. Child gets a transfusion.

There are cases which have said, for example, where a mother is still carrying he infant in her womb, refuse medical treatment which will be deleterious to the child in the wound, there are orders that have been entered that say you've got to take that treatment even if it's against your religious beliefs because it affects the unborn. And we're there to preserve life.

The entire argument, and it's an excruciating argument over the death penalty and is an argument in favor of life. The reason the Supreme Court is going through all of the gyrations, and I don't have any quarrel with what they are doing, because they say we don't want to be the cause of somebody's death because we support life. That's the principle.

So with all of that and with the affidavit in front of me, the I fall back to those guiding principles which have to do with injunctive orders issued by judges at the outset of litigation.

And I've said here on the record many times, the first principle for any judge who is asked to put an injunction in place at the outset of litigation, the first principle is don't do it. That's first. Because you haven't had a compete hearing and an injunctive relief usually is plenary relief.

At the end of the case somebody wins and somebody loses. And the judge says you're enjoined from doing that permanently. You're finished. That is the general principle; but there are exceptions and the exceptions are very clear and the principles are well known.

If you have to enjoin in the beginning of a case, do so only to prevent immediate and irreparable harm and injury. Now, you say as far as the unborn, that's in the womb of V.C. if I don't enjoin there will never be a possibility of birth and there will never be a possibility of personhood beyond the birth period as the constitution would protect.

So harm in the sense of the unborn is irreparable. Now, maybe the process of nature will mean that that child will never be born. Maybe there will be a miscarriage some place along the line. That's something we're not talking about. We're talking about

doing something affirmative and active to prevent a natural development.

The questions is, is that a development of life and the affidavit say positively if it's so, if what Dr. LeJeune says is so, then at the moment of conception all of the full blown characteristics of that individual when the individual is ultimately born and grows and comes to the peak of its abilities, physical abilities, all of that is decided at the very moment of conception.

His analysis of DNA and comparison of the tapes and signals and things like that is fascinating and maybe a complete hoax on his part. Other people may not agree with it but it really is very interesting thing to read.

And he says that's when it starts and the whole future is predicted except if it's hit by a bus or gets killed, there is an accident or falls off a cliff.

But the whole process of mental growth, the facial features, the color of hair, all of that is right there in that moment of conception. If you say that and if it is so, then you say to yourself there is something protectable there. At least whatever is there should have a right to a hearing to determine whether it is life.

Whether LeJeune is right or wrong, whether Nathanson is right or wrong, but with those affidavits it looks like if I go have the abortion, irreparable harm as to whatever is there.

SO the first standard is met, so to speak, for our purposes today. The second is a standard even if there is perceptible irreparable harm don't do it, judge, unless you find there is a probability of ultimate success.

Now in the ordinary run of the mill chancery cases, I have said that calls upon the chancery judge to exercise an educated hunch as to what is likely to occur. And the exercise of that judgment, that discretion is left to a veteran chancery judge y appellate courts.

And they say he's had experience along the line. He has a feel for cases like this; and, therefore we'll leave the first decision up to that judge, him or her to decide whether he thinks or she thinks there is a possibility of ultimate success.

It involves some judicial crystal ball gazing but against the background of experience and a knowledge of people perhaps and a knowledge of the law.

So I do it and every other chancery judge does it, hunching through to a probability of ultimate success. In some

cases it's clear. In other cases it's not clear. And in those cases injunctions are granted.

In some cases it's clear there will never be a probability of ultimate success so don't grant the injunction. And then the third standard if you find the first two exists, then still before you impose the injunction, sit back and thing of the consequences of what you do.

What happens to the one person if you impose the injunctive order. What happens to the other one. And I use person now just in a legal since, not definitive here. What happens to the other person if you don't' impose the injunctive order.

Those opinions and those principles apply here. So the irreparable harm arguably is there and on the papers before me certainly is there because they say from moment of conception all the way along. So irreparable harm to what is there, I think, is quite clear.

Now, the probability of ultimate success. That's a mixed question. It's a mixed question of fact and law because I keep saying what is there. I keep saying based upon what is before me and that's a one-sided presentation, I recognize.

Now are there equally qualified experts who will come in and say LeJeune is wrong. Nathanson is wrong. That's not the way it works. That's not the biology of it. What's the word I'm looking for, the embryology of it.

I think that LeJeune is an embryologist. And I will have to listen and say LeJeune looks pretty good on paper. When he comes here, he doesn't turn out to be so hot or Nathanson looks pretty good on paper, but when he comes to testify, he doesn't stand up against the others who are more qualified, more expert and more involved in deciding this business of when does life begin.

But I do know that the U.S. Supreme Court has never done that. I do know that the New Jersey Supreme Court has never done that. Neither of those courts has had a record which is made in a trial court in a judicial fashion in which the judge evaluates qualifications.

A judge evaluates the worth of testimony and a judge makes a call one way or the other. The judge can't sit and say we need not resolve the difficult question of when life begins. A trial Judge can't do that. The issue is there. The trial judge has to one

way or the other resolved it. He could back off the field and say gee, I don't know fellows.

That's what trial judges are. So our Supreme Court in Right to Choose v. Byrne states at page 299 of the opinion in 91 N.J. Reports, "We do not presume to answer the profound questions about the morale, medical and societal implications of abortions nor do we undertake to determine when life begins or at what point fetus is a person."

They backed off because there was no factual record at all before them. That was the question of funding abortions and there was no record before them at all as to whether the question of when life begins or when a fetus becomes a person but that record had to be made. It can't be made unless there is a litigated case.

Now, in this case the question is, is there a probability of ultimate success and I am frank to say I don't know the answer to that.

The unborn has to prove, through its guardian ad litem, that it has life. It has to prove, through its guardian ad litem, at what point a court can say that life is equated with a person because there may be a difference between the two, I don't know.

But the irreparable harm is so overwhelming if the fetus is ultimately able to say yes there is life or the court can say yes there is a life, yes there is a person, to say I'll never give it chance by allowing the abortion means the issue can never be reached and the answer can never be given and then reviewed by an appellate court one way or the other.

So if I don't we it to the unborn here, I owe it to people who constantly ask this question to start and make a record and to start the process where somewhere, some day the definitive answer may be given.

So for that reason even though the probability of ultimate success is either way, the scales are balanced, if you wish, the irreparability of the harm is so strong. And then we get to the balancing issue.

Now, I'm not passing over that quickly because during the time we're making a nice record here that fetus is growing in V.C. And she may be getting more anxious and it maybe creating medical difficulties. You know, I am aware to that possibility too and certainly an application is always open to come back to me and say you know release the injunction because we got a problem here.

An argument can be made when we get back here to the hearing and we'll talk about when he get back here, an argument can be made when we get back here, judge, at some point in time no matter how nice the question is and how interested in all the lawyers and folks are that we're talking about, V.C. we've got look at her and her interests too and she does have interests.

So for our purpose today I will continue the injunctive order which I previously entered as a temporary restraint and I think, as I've said, there is a basis for doing that. That was never don in Roe v. Wade.

There was never a guardian ad litem. Keep coming back to the point where nobody has ever really made the record. There is also the argument that has been touched upon in the briefs and that is the question or personhood and when the label sticks so that it becomes constitutional and protectable is something that may vary between the U.S. Constitution and the New Jersey Constitution.

You know our courts have said many times that while we all give deference to the United States Constitution because it is the law of the land, there is no prohibition in that constitution from the states acting under their constitution giving it more expanded

rights perhaps than the U.S. Constitution and our state has not been slow to do that either. So there is that argument.

So that I am willing to undertake the fact finding issue as to the -- what I don't know, that is what is life, when life begins and the legal issue that turns upon those facts as to when personhood arguably attaches so that constitutional rights are created.

But at the very least when we talk about the unborn, we can talk about a potential life and we can talk about a potential person because unless the process is interrupted that's what would happen.

So that potentiality is protectable by the injunctive order until we can determine whether we can drop, as I've said, the adjective or not.

So we'll continue the injunctive order. Now, the big thing is keeping V.C. in mind, when can we have a factual hearing and we need an answer on behalf of V.C.

MR. ROBERTSON: I understand.

THE COURT: And I can take it -- may I just digress. The clinic which is restrained doesn't appear because they say whatever the Judge says we'll do.

MR. CASSIDY: The lawyers for the clinic advised me that thy have no intention of appearing because they are only being restrained with respect to this one particular individual and so they have know intention of being heard. They'll not file an Answer.

THE COURT: They'll do whatever the judge says.

MR. CASSIDY: Of course, we would want the injunction against them.

THE COURT: And to continue and I will for that purpose.

MR. CASSIDY: In fact -- no, I want to ask for them --

THE COURT: Leave it the way it is because that's sufficient. But timing?

MR. ROBERTSON: Your Honor, I'm in somewhat of an unusual position. I served in a sense as a first line of defense for V.C. and although I may participate in emergent application to the appellate division from this court's order today, that probably will be the extent of my participation. I'll be substituted by other counsel and --

THE COURT: You'll have to rally the troops kind of.

MR. ROBERTSON: So to speak. And I would ask I be allowed to defer giving the court an answer as to when an answer can be filed and when a hearing can be held.

I will put other counsel in contact with Mr. Cassidy as well as the court as soon as I can.

THE COURT: I recognize Mr. Cassidy has backing for his position and I'm sure that V.C. will have backing for her position now that people know it's going to be a fact finding hearing.

MR. ROBERTSON: I'm sure that will be the case.

THE COURT: All right, prepare the order any way so I can sign it and the interlocutory appeal can go forward.

MR. CASSIDY: Should we at least set a conference date so we can talk about streamlining the hearing?

THE COURT: I have to confer with the somebody. I hear it said Mr. Robertson will now be contacting the somebody and letting us know as soon as you can who the lawyer to whom we're supposed to direct --

MR. ROBERTSON: Your Honor, I did submit a form of order with my notice of motion and I phrased it such it would be used either grant or deny the relief question. I'd like to leave with a copy of the filed Order.

THE COURT: I can enter it.

MR. CASSIDY: While your Honor is at it, may I ask your Honor to certify the portion of Your Honor's ruling that was

adverse to my client. Could you certify that interlocutory order is final.

THE COURT: Why don't you just cross appeal. There is a notice of appeal from this order and then cross appeal as to that. Certifying things as final gets trial judges into big trouble with appellate judges sometimes. So I would much rather you simply cross appeal.

Only thing that's not covered in the order is that which Mr. Cassidy would like to cross appeal on and that is the dismissal of J. M. as an individual party. Why don't you give me an order.

MR. CASSIDY: Is it possible for you to just write plaintiff individually dismissed so that we have one order to deal with? I would appreciate it, Judge.

THE COURT: Further ordered the plaintiff's complaint shall not be dismissed, however, J.M. as an individual does not have standing to prosecute the action. Good enough?

MR. CASSIDY: Okay, then I would ask you to specifically appoint him as guardian ad litem to prosecute on the action on behalf of the infant.

THE COURT: In can only write so much. I will do that. I said I would probably do it. I'll say now that effectively the caption is going to read J.M. as guardian ad litem.

MR. CASSIDY: I'll submit a separate order.

THE COURT: If you want to clean it up and make it look nicer, that's okay.

Thank you for being here and arguing and doing all the briefs you've done in the short time. Interesting.

- CERTIFICATE -

I, JAMES W. OVERBY, do hereby certify that the foregoing is a true and accurate transcript of the within proceeding, as taken by me stenographically on the date and place hereinbefore set forth.

/s/ James W. Overby
JAMES W. OVERBY, C.S.R.
Official Court Reporter

DATE: March 23, 1992

EVANS, OSBORNE & KREIZMAN
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(908) 741-9550
Attorneys for Defendant V.C.
pl\vc.2

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff, vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendants.	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 <u>CIVIL ACTION</u> ORDER

This matter having been opened to the Court by Evans, Osborne & Kreizman, attorneys for Defendant V.C., Lewis H. Robertson, Esq. appearing, on notice to Cassidy, Foss & San Filippo, attorneys for Plaintiff J.M., Harold J. Cassidy, Esq. appearing, and the Court having considered the moving papers and

any response and reply thereto and argument of counsel, and it appearing to the Court that certain relief is warranted; it is on this 19th day of March, 1992,

ORDERED that the restraints heretofore entered by this Court's Order of March 9, 1992, shall be and are herewith continued; and it is further

ORDERED that the Plaintiff's Complaint shall not be dismissed however, J.M. as an individual does not have standing to prosecute the action.

/s/ Patrick J. McGann, Jr.
PATRICK J. MCGANN, J.S.C., P.J.Ch.

ORDER ON EMERGENT APPLICATION

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent, Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants, Cross-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-742-91T5
MOTION NO. M-3884-91
M-3886-91
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: 3/20/92 BY: Lewis H. Robertson (Evans, Osborne & Kreizman) for defendant)

ANSWER(S) FILED: BY: Harold J. Cassidy (Cassidy, Foss & San Filippo) and Patrick J. Mullaney for Plaintiff

BY:

APPEARANCE ONLY: BY:

DATE ARGUED: 3/23/92

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 23rd DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO APPEAL FROM TRIAL COURT'S ORDER OF MARCH 19, 1992 CONTINUING

RESTRAINTS HERETOFORE ENTERED AND DENYING DEFENDANTS' APPLICATION FOR DISMISSAL OF COMPLAINT	GRANTED	DENIED	OTHER
	X	X	X

SUPPLEMENTAL:

We grant the motion of defendant, V.C., for leave to appeal solely with respect to the part of the trial court's order of March 19, 1992, which continues the restraints contained in the trial court's order signed on March 7, 1992 and entered on March 9, 1992. Pursuant to R. 2:11-2, we elect to consider the merits of the appeal. We summarily reverse the part of the trial court's order of March 19, 1992 continuing restraints and vacate paragraphs (A), (B) and (C) of the court's order of March 7, 1992 as well as the further paragraph of that order which prohibits V.C. from leaving the State of New Jersey for the purpose of terminating her pregnancy. We are satisfied that the restraints granted by the trial court are clearly unjustified in view of Roe v. Wade, 410 U.S. 113, 35 L.Ed. 2d 147 (1973), Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 49 L.Ed. 2d 788 (1976) and Right to Choose v. Byrne, 91 N.J. 287 (1982).

Plaintiff having represented to this court that he would make an immediate application for emergent relief to the Supreme Court of New Jersey if the restraints granted by the trial court were dissolved and having requested a brief stay of the dissolution of the restraints issued by the trial court until 4 p.m. on March 24, 1992.

We deny defendant's motion for leave to appeal from the part of the trial court's order denying her motion to dismiss the complaint.

Except for the part of this order which denies defendant's motion for leave to appeal from the trial court's denial of her motion to dismiss the complaint, Judge Shebell dissents for the reasons expressed in his attached opinion.

FOR THE COURT:
/s/ Stephen Skillman
STEPHEN SKILLMAN, J.A.D.

ORDER ON EMERGENT APPLICATION

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent, Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants, Cross-Respondents

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-742-91T5
MOTION NO. M-3884-91
M-3886-91
BEFORE PART: E
JUDGES: SHEBELL
SKILLMAN
D'ANNUNZIO

EMERGENT APPLICATION FILED: 3/20/92 BY: Lewis H. Robertson (Evans, Osborne & Kreizman) for defendant)

ANSWER(S) FILED: BY: Harold J. Cassidy (Cassidy, Foss & San Filippo) and Patrick J. Mullaney for Plaintiff

BY:

APPEARANCE ONLY: BY:

DATE ARGUED: 3/23/92

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 23rd DAY OF MARCH, 1992, HEREBY ORDERED AS FOLLOWS:

EMERGENT APPLICATION FOR LEAVE TO CROSS APPEAL FROM THAT PORTION OF THE COURT'S ORDER OF MARCH 19, 1992

WHICH DISMISSES PLAINTIFF'S COMPLAINT BROUGHT IN HIS INDIVIDUAL CAPACITY

GRANTED	DENIED	OTHER
	X	

SUPPLEMENTAL:

Judge Shebell dissents from this order for the reasons expressed in his attached opinion.

FOR THE COURT:

/s/ Stephen Skillman
STEPHEN SKILLMAN, J.A.D.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
AM-742-91T5
M-3884-91
M-3886-91

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent,
Cross-Appellant,

vs.

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of defendant corporation

Defendant-Appellants,
Cross-Respondents

SHEBELL, J.A.D., dissenting.

I cannot agree with the majority that emergent relief is appropriate and that the restraints imposed by the trial judge should be removed. The law pertaining to abortion is in a state of flux. See Webster v. Reproductive Health Servs., 492 U.S. 490, 106 L.Ed.2d 410 (1989); Planned Parenthood of S.E. Pa. v. Casey,

947 F.2d 682, 695, 698 (3d Cir. 1991). The United States Supreme Court's holding in Roe v. Wade, 410 U.S. 113, 35 L. Ed.2d 147 (1973) in the view of many represents an erroneous interpretation of the Constitution-inventing a constitutional right to an abortion, now exclusively in the mother, where none previously existed or could even have been contemplated by our founding fathers.

This court should not at this time rush to judgment. In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. Cf. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 49 L.Ed.2d 788 (1976).

The courts or our Legislature, if given the opportunity, perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge. There is no other way the issue can be preserved in this case. Should the action of any court be less than to protect the subject matter of the controversy presented to it?

Further, I would grant leave on the cross-appeal of the natural father individually, and I would summarily reverse and remand so that all of the relevant issues may be reviewed on a complete record.

SUPREME COURT OF NEW JERSEY
M-960/970/971 September Term 1990

J.M., Individually and as
guardian ad litem of his
unborn child,

Plaintiff-Respondent,

v.

V.C., a fictitious name of a real
individual;

Defendant-Movant,

and

W.M.C., a fictitious
name of a real corporation;
JOSEPH BLOW and RICHARD ROE,
et al.,

Defendants.

This matter having been duly presented to the Court, and the Court having determined that plaintiff has failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint, and the Court having concluded that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of the legal issues properly before it;

And good cause appearing;

It is ORDERED that the motion for leave to appeal the denial of defendant's application to dismiss the complaint of J.M. as guardian ad litem (M-969) is granted; and it is further

ORDERED that leave to appeal having been granted, the motion for a summary reversal of the trial court's order (M-970) is granted, and the complaint is dismissed; and it is further

ORDERED that the motion to vacate the temporary stay of the Appellate Division(M-971) is granted.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-961/2/3/5/6/7/8 September Term 1990

J.M., Individually and as guardian ad litem of his unborn child,

Plaintiff-Respondent,

v. ORDER

V.C., a fictitious name of a real individual; W.M.C., a fictitious name of a real corporation; JOSEPH BLOW and RICHARD ROE, et al.,

Defendants-Respondents

This matter having been duly presented to the Court, and the Court having determined that plaintiff has failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint,

And good cause appearing;

It is ORDERED that the motion for leave to appeal the dissolution of restraints by the Appellate Division (M-961) is denied; and it is further

ORDERED that the motion for summary reversal on the issue of restraints (M-962) is dismissed as moot; and it is further

ORDERED that the motion for a stay (M-963) is denied; and it is further

ORDERED that the motion for leave to appeal the dismissal of the complaint of plaintiff as an individual (M-965) is denied; and it is further

ORDERED that the motion for summary reversal of the order of partial dismissal by the trial court (M-966) id dismissed as moot; and it is further

ORDERED that the motion for leave to file an overlength brief (M-967) is granted; and it is further

ORDERED that the motion to strike affidavits submitted by defendant (M-968) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-988/989 September Term 1990

J.M., etc.,

Plaintiff-Movant,

v. ORDER

V.C., et al.,

Defendants-Respondents

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a supplemental brief (M-988) is granted; and it is further

ORDERED that the motion for reconsideration (M-989) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-988/989 September Term 1990
35,000

J.M., etc.,

Plaintiff-Movant,

v.

CORRECTED
ORDER

V.C., et al.,

Defendants-Respondents

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a supplemental brief (M-988) is denied; and it is further

ORDERED that the motion for reconsideration (M-989) is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 24th day of March, 1992.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
Clerk of the Court

Area Code 202
479-3011

March 25, 1992

Mr. Harold J. Cassidy
Cassidy, Foss & San Filippo
225 Broad Street, PO Box 896
Red Bank, NJ 07701-0896

RE: J.M.,
v. V.C., et al.
Application No. A-713

Dear Mr. Cassidy:

The application for a stay in the above-entitled case has been presented to Justice Souter, who on March 25, 1992 endorsed thereon the following:

"Denied
DH Souter
25 March 1992"

Very truly yours,

WILLIAM K. SUTER, Clerk

By
/s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
Clerk of the Court

Area Code 202
479-3011

March 25, 1992

Mr. Harold J. Cassidy
Cassidy, Foss & San Filippo
225 Broad Street, PO Box 896
Red Bank, NJ 07701-0896

RE: J.M.,
v. V.C., et al.
Application No. A-713

Dear Mr. Cassidy:

The application for a stay in the above-entitled case has been presented to Justice Thomas, who on March 25, 1992 endorsed thereon the following:

"3/25/92
Denied
Clarence Thomas"

Very truly yours,

WILLIAM K. SUTER, Clerk

By
/s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

CASSIDY, FOSS & SAN FILIPPO
225 Broad Street, Box 896
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Co-Counsel for the Plaintiff

J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff-Appellant vs. V.C.; W.M.C.; JOSEPH BLOW AND RICHARD ROE, fictitious fictitious names of real individuals who are employees agents of the defendant corporation Defendant-Respondents	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 <u>CIVIL ACTION</u> ORDER DENYING MOTION FOR RECONSIDERATION FILED ON BEHALF OF J.M. INDIVIDUALLY

THIS MATTER having been presented to the Court on behalf of J.M. in his individual capacity, seeking an Order to reconsider that portion of the court's Order of March 19, 1992, which dismissed the Complaint brought by J.M. individually and ruling that he had no standing ~~to raise any rights of the unborn child of~~

~~V.C.~~ and the court having heard the matter on Tuesday, May 12, 1992, Harold J. Cassidy, Esq., appearing on behalf of the plaintiff, and Frances Farber-Walter, Esq., appearing on behalf of the defendant, and good cause having been shown;

IT IS on this 12th day of May , 1992;

ORDERED that the motion filed by J.M. in his individual capacity seeking reconsideration of the Chancery Division Order of March 19, 1992 which dismissed his Complaint in his individual capacity be and is hereby denied; and

IT IS FURTHER ORDERED that a true copy of the within Order has been served upon all parties within 7 days of the date hereof.

signed: 5/21/92 /s/ Patrick J. McGann, Jr.
PATRICK J. MCGANN, J.S.C.

91-2034

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., Individually

Petitioner,

-against-

V.C.,

Respondent.

VOLUME II OF PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Harold J. Cassidy, Esq.
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Co-Counsel for the Plaintiff

JOHN DOE, a fictititious name of a real person, individually; JOHN DOE, a fictitious name of a real person, guardian ad litem for his unborn infant child, Plaintiff, vs. JANE ROE, a fictitious name of a real person; et al	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92 Civil Action

BRIEF IN SUPPORT OF PLAINTIFF'S APPLICATION FOR RESTRAINTS

On the Brief:

Harold J. Cassidy, Esq.
Patrick J. Mullaney, Esq.
Co-Counsel

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PROCEDURAL HISTORY, NATURE OF THE ACTION AND STATEMENT OF FACTS

In this case, the Plaintiff, John Doe, seeks to preserve the life of his unborn child, was life is threatened by an abortion procedure scheduled for Wednesday, March 11, 1992. This is an abortion case which presents questions concerning the rights of a father, the rights of an unborn child, and the role of the powers of the State when called upon to intervene, and two natural parents who disagree on the fundamental question of whether their child should be permitted to live.

This case implicates some of the most precious rights and sacred obligations that we have as a people of the State of New Jersey and the United States of America. It presents questions concerning the sanctity of life and the moral course of our laws. It was once observed by Oliver Wendall Holmes that:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race.[1]"

It is not likely that these words have greater application than to the legal questions presented by this case, and its outcome may

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[1] Oliver Wendall Holmes, Jr., The Path of the Law, 10 Harvard Law Review 457 (1897).

well be the measure of what dignity is extended to the life of the people to whom it applies.

A.
BACKGROUND

This is a case in which an act of love between a man and his fiancee, and their subsequent disagreement concerning the future of the child they conceived, now forces the State of New Jersey, and perhaps our very culture, to choose a policy and constitutional principles which support the preservation and dignity of life or choose principles which destroy life itself. The considerations and legal principles implicated compel granting to the plaintiff the injunctive relief that he seeks in this case in order to preserve the life of his unborn child.

The plaintiff, John Doe, institutes this action seeking emergency relief for an injunction preventing his unborn child's mother from obtaining an abortion designed to terminate the life of the child. The Complaint was filed with the court on Monday, March 9, 1992 and the plaintiff seeks temporary restraints on an Order to Show Cause.

John Doe is not the real name of the plaintiff but is a fictitious name used to protect the identity of the child's mother and to

protect the child in the event the plaintiff succeeds in his application. It is the plaintiff's belief (and he makes simultaneous application for Orders protecting the identity of the parties because) it would be harmful for the child to know that the child's mother attempted to terminate his or her life.

John Doe is thirty-eight (38) years of age and met the defendant Jane Roe, thirty-two (32) in July of 1991. The two dated and in September of 1991 the plaintiff first proposed marriage to the defendant. Jane felt that she wasn't ready for marriage, but indicated to the plaintiff that it was something that she would consider. As the relationship continued and grew, in February of 1992, Jane suspected she was pregnant. She performed a test on her own that proved positive for pregnancy, and a repeat test in the presence of the plaintiff verified this fact.

On Monday, March 2, 1992, Jane was examined by a physician in Monmouth County who confirmed that she was pregnant with an eight-week year old unborn child. The plaintiff continuously expressed his support to her, proposed marriage again, and indicated that he would live up to all his obligations as father, whether or not she married him or felt capable of assisting in rearing the child. Jane indicated that she was unprepared for

marriage and on Wednesday, March 4, 1992 advised the plaintiff that she determined, with certainty, that she would seek an abortion. At that time she told the plaintiff that an abortion procedure was scheduled for the morning of Wednesday, March 11, 1992 at a hospital facility located in Monmouth County, New Jersey.

After the plaintiff concluded that he was unable to persuade Jane to preserve the life of the child, he sought and retained counsel on Saturday, March 7, 1992 and instituted this action on Monday morning, March 9, 1992.

B.

THE FACT THAT LIFE BEGINS AT CONCEPTION - THE COMPLETENESS OF THE UNBORN CHILD AS A UNIQUE HUMAN BEING IMMEDIATELY AFTER CONCEPTION

Eloquent and powerful testimony is offered (in the sworn testimony filed in support of plaintiff's application) concerning the fact that human life begins at conception and the child is a complete human being, unique in character immediately following conception. Relevant to these fact questions the Plaintiff produces

the testimony of Jerome LeJeune, M.D., Bernard Nathanson, M.D. and Russell Hittinger, Ph.D.[2]

Jerome LeJeune, M.D. is a world renowned geneticist who is currently a professor at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to "chromosomal mistake" (examining over two thousand children each year and maintaining records of thirty thousand children over his lifetime). (I T36-10 to 24). Among the many of his life's achievements includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to "an excess of genetic material" consisting of the extra chromosome, now known as number twenty-one. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (I T39-7 to 25).

Dr. LeJeune and his colleagues have tried to understand the nature of every human being and why and how they are afflicted

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[2] References to the testimony of Dr. LeJeune, Dr. Nathanson and Dr. Hittinger, where referenced, pertain to the sworn testimony that has been submitted in support of the plaintiff's emergent application and transcript numbers relate to that testimony contained in the transcript provided, dated April 13, 1991. Page and line numbers pertain to that particular transcript.

by "constitutional difficulty" (I T36-25 to I T37-5) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the Genetic Conference in Moscow. In addition, he was a member of the Pontifical Academy of Science and as a member of the special group that studied the damages of atomic war, was requested by Pope John Paul II to travel to Moscow to speak to Mr. Brezhnev on behalf of the Vatican (I T36-10 to I T39-4). He was the first to give a course on human genetics at California Institute of Technology.

Dr. LeJeune testified, based upon current scientific knowledge accepted within the scientific community, to the facts which support his conclusion that human life begins immediately upon conception when there is a complete, unique human being, a person.

Dr. Bernard Nathanson, an accomplished practicing obstetrician and gynecologist from New York City, testified concerning the medical evidence relevant to the completeness and

the independent nature of the child in utero. Dr. Nathanson was educated at Cornell University and McGill University Medical College in Montreal, Canada. He was Board Certified by the American Board of Obstetrics and Gynecology in 1960 and currently is an attending obstetrician and gynecologist at St. Vincent's Hospital Center, New York; St. Luke's Roosevelt Hospital, part of Columbia University College for Physicians and Surgeons; and New York Hospital Cornell Medical Center. In addition to being a member of most major medical associations, Dr. Nathanson has published numerous scientific articles and several books in the area of bio-ethics including fetal development, embryology and fetology. He lectures in these areas and has professorships at two universities (I T84-4 to I T87-12).

Dr. Nathanson probably has had more experience in abortion and abortion technology than anyone in the country, having been the Director of the largest abortion clinic in the United States for two years, his research and publication in medical literature, his scientific papers on the techniques of abortion, and his study of complications of abortion and related issues.

Dr. Nathanson testified to knowledge that has been gained since the time Roe v. Wade made abortions legal, including new

techniques for fetal surgery, new ultra sound advances which permit observation of the fetus in an animated fashion within the womb and the discovery of data concerning the immunization system of the mother and its factor in pregnancy. Dr. Nathanson testified that the fetus is a separate human being apart from the mother consistent with the observations of Dr. LeJeune that two separate individual human beings harmoniously share their lives together throughout the entire pregnancy. (See Summary of Judge Noonan at Da 17-11 to Da 20-2).

The record in this case submitted in support of the plaintiff's application for emergent injunctive relief supports the irrefutable and inescapable conclusion that life begins at conception, that the unborn child fathered by the plaintiff at the age of eight weeks is a human being, complete and separate in and of him and herself, is a member of the human race and is a person as a matter of fact and as a matter of law.

ARGUMENT

POINT I

RECENT DEVELOPMENTS AND DISCOVERIES IN SCIENCE AND MEDICINE SUPPORT THE IRREFUTABLE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THE UNBORN CHILD IS A COMPLETE INDIVIDUAL MEMBER OF THE HUMAN RACE THROUGHOUT PREGNANCY.

Since the time the Supreme Court of the United States rendered its decision in 1973 in the case of Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973) the sciences of human genetics and medicine have made discoveries and obtained information that supports the irrefutable conclusion that the life of a human being commences at the moment of conception, and the individual's identity is fully developed, its genetic material and information is complete and there exists a person within any reasonable definition. Thereafter the child is nurtured and develops without any additional genetic information or material.

A.
THE SCIENCE OF GENETICS SUPPORTS THE CONCLUSION THAT THE LIFE OF AN INDIVIDUAL MEMBER OF THE HUMAN RACE BEGINS AT THE MOMENT OF CONCEPTION.

1. INTRODUCTION

The record[3] containing the authoritative testimony of Dr. Jerome LeJeune supports the conclusion that a complete identifiable member of the human race exists at the moment of conception, and is a person at the early stages of physical development.

All of the genetic information necessary and sufficient for a particular human being exists at the moment when the human life begins at conception. The life of each of us commences at the moment that the genetic information is complete and a unique individual is created. This event occurs when the head of the male sperm penetrates inside the female's ovum. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms. (I T42-7 to 24).

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[3] References to the testimony of Dr. LeJeune, Dr. Nathanson and Dr. Hittinger, where referenced, pertain to the sworn testimony that has been submitted in support of the plaintiff's emergent application and transcript numbers relate to that testimony contained in the transcript provided, dated April 13, 1991. Page and line numbers pertain to that particular transcript.

The once held belief that a mother contributes to the make up of the child following conception is now known with certainty to be false. Everything that is necessary to be a human being is present immediately after conception (I T47-14 to 20; I T48-13 to 20). Either the whole information is present for conception of a human being (and development to full stages of growth) at the moment after the entry of the sperm into the ovum or the genetic information is insufficient and no human being shall develop and conception will fail (I T48-21 to I T49-2; I T52-17 to 20).

The completeness of the human being immediately upon conception is such that there is a specificity of both the species and the complete identity of the individual member within the species. Not only is it possible to identify the resultant cell after conception as being human in nature, the individual identity or person is known and can be identified (I T57-2 to 23). In each instance, this marvelous phenomenon at the moment of fertilization (conception) is a pure novelty which has never occurred before in the history of mankind: a new constitution of a personally devised constitution for a particular person. This new constitution is complete in all of itself which is capable of being identified, its genetic material being capable of being read and the

makeup of chromosomes complete. We have, in short, a human being immediately after the moment of conception (I T58-1 to 12; I T59-18 to I T61-14).

2. THE PROCESS OF FERTILIZATION

Just prior to conception there are thousands of sperm swimming around one single female egg and through the process of nature, one sperm is elected which will penetrate the egg or ovum (I T43-14 to 16). There is in this process of fertilization an extraordinary device employed by nature to protect the privacy of the life of the person immediately upon conception. The right of privacy is actually written into the law of nature. The egg, which is a little sphere of one and one-half millimeters in diameter, is protected by a transparent membrane which completely covers the egg. This membrane is known as the zona pellucida. Immediately upon a sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed. Within micro seconds it becomes completely impenetrable by any other sperm (I T49-3 to I T50-5).

3. DNA AND THE SOURCE OF GENETIC INFORMATION

The necessary genetic information to create a human being is contained in DNA, a long thread molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put upon the point of a needle. These twenty-three pieces are chromosomes. The ovum also contains twenty-three little chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the genetic make up. The information provided by the male sperm is approximately fifty billion bytes of information. However, the information contained inside the egg is much greater, so much so that it is presently uncountable, so that the greatest computers cannot hold the amount of information which is inside one reproductive cell once fecundation occurs (I T46-25 to I T47-6). In his sworn testimony, Dr. LeJeune, in an effort to make the interaction of the biological components understandable, analogized the process to a tape recorder which plays music. He suggested that if one places a mini cassette on which the music of an artist such as Mozart is recorded and put it in a tape recorder, you experience the sound

of a symphony. The tape itself has no notes of music and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is being experienced by the listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg, which receives the tape band from the father and which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony) but information in the cell itself, which reads it. The cell is analogous to the magnetiscope of the tape recorder and possesses within it enormous information (I T44-6 to I T46-24).

4. THE RECENT DISCOVERY OF THE JEFFREY METHOD AND BAR CODE PERMITS IDENTIFICATION OF THE MEMBER OF THE HUMAN SPECIES IMMEDIATELY AFTER CONCEPTION AND SUPPORTS THE CONCLUSION THAT A HUMAN BEING EXISTS AT CONCEPTION.

Approximately four years prior to the trial in this matter a Englishman named Jeffrey made a discovery and developed a technique which has the capability of determining the identity of a particular human being. Jeffrey discovered that in part of the chromosomes the DNA is repetitive. It can be repeated as much as one hundred times, so if harm is caused to some of the segments, some of the sequence will provide the genetic function and the human being will survive. In his work, Jeffrey developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffrey's technique has proven that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of the person being examined and is specific to the individual. That the identity of the person or the individualization of the member of the human race takes place at conception has been confirmed by the Jeffrey method (I T54-3 to I T56-20).

5. METHYLATION OF CYTOSINE REPRESENTS A VERY RECENT DISCOVERY WHICH EXPLAINS THE SCIENCE OF GENETICS PREVIOUSLY UNKNOWN. IT SUPPORTS THE CONCLUSION THAT THE HUMAN BEING IS A COMPLETE PERSON AT THE MOMENT OF CONCEPTION.

Totally unknown as recently as four years ago (and unavailable when Roe v. Wade was decided) was the process of Methylation of Cytosine (which is contained on a piece of DNA). What has been learned is that the DNA is even more sophisticated than previously suspected and the messages are written "letter by letter", piece by piece. There is basic information with indications that some information must be read immediately and some information must be read at a later time. What is meant by the Methylation process is that everything to make this particular human being exists at fertilization, but is not read at the instant of conception. This discovery was never expected ten years ago and never predicted: that, in fact, the father's genes underline instructions to immediately produce the membranes inside which the embryo will develop itself (its space capsule) and to make the placenta which is the body by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm not in the mother's egg. The male genetic material therefore builds the membranes which becomes the shelter and the placenta which is the food gathering system. The female information acting in concert with the male information provides the mechanism for the development of the parts of the

physical anatomy. All of this information and the sophisticated directive mechanisms is contained in the first cell. The significance of this information is that it was discovered that it is definitely ruled out that there can be a genetic constitution made from one parent only. It is not possible in an egg to put two pronuclei from the mother only. It will not be a human being. It can make "parts" such as skin, hair, teeth, some nervous cells, but not at all build a form and there will be no child. Essentially the same thing is true without the maternal nuclei. It will not form a human being. So it is absolutely required that, in the first cell, there be the DNA underlined by Methylation in the male way and the DNA Methylation in the female way for there to be a human being.

The extraordinary observation made is that the only cell in all of the life of a person in which those two Methylation systems from father and from mother are present together inside one cell is in the very first cell which gives life to a person. At each progressive stage of development this Methylation is erased and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned that the male way of "spelling" is obligatory for muscles so that

even in the female information which builds the muscles has to be underlined in the paternal way. This understanding contradicts any previous notions that fetal development occurs only through the mother. It is now clear that the child is a complete human being programmed for life from conception (I T62-21 to I T67-7).

6. THE SCIENCE OF GENETICS IRREFUTABLY CONCLUDES THAT A FERTILIZED EGG, IMMEDIATELY AFTER THE MOMENT OF CONCEPTION, IS A MEMBER OF THE HUMAN SPECIES, IS A HUMAN BEING AND IS A PERSON.

To conceptualize the person at the age of eight weeks post conception, Dr. LeJeune described what the child looks like. The child was only the size of a person's thumb measured from its head to it's "rump", one inch. Inside the human embryology the child can be visualized as a tiny human being with fingers, toes, a face and palm prints that you could read with a microscope. You would be able to see the child's sex. The child has a heart beat and with the mother there are two rhythms between her heart and the child's which are detectable. The child's heart beats about one hundred and forty times a minute if it is a boy and about one hundred and sixty times a minute if it is a girl. An abortion of an eight week only fetus kills a member of the human species (I T67-

23 to I T69-24). That there is completeness of the human being and its identity as a person from the moment of conception when its chromosomal make up is complete not only as to the species but as to the individual member of the human race is irrefutable. There exists a specificity of the uniqueness of a human being at the beginning of life, at fecundation, at fertilization at conception (I T50-13 to I T52-20).

B.
RECENT MEDICAL DISCOVERIES PROVE THAT THE CHILD IS A SEPARATE HUMAN BEING DISTINCT AND APART FROM THE MOTHER AT ALL PHASES OF PREGNANCY AND IS A PERSON WHO IS A MEMBER OF THE HUMAN RACE.

Current knowledge of modern medicine and its recent developments all support and are consistent with the conclusion that an individual member of the human race, one separate and apart from its mother, has a life immediately following conception.

1. THE ANATOMY OF THE FEMALE REPRODUCTIVE SYSTEM

The uterus, the key organ of the female reproductive system, is a pear shaped organ which has at its lower end the cervix. The cervix is a narrowing which resembles a "bottle neck". It contains within it a cavity and is positioned above the vagina which is the

lower most point of the female reproductive system (I T88-14 to 25).

At the top of the uterus on both sides are fallopian tubes. They function as a conduit for descending eggs from the mother's ovaries. The ovaries are located above and at the outer limits of the fallopian tubes on both sides. The function of the ovaries are to manufacture, or produce the female eggs or ova. The egg "pops" out of the ovary and is caught by the tube (I T89-1 to 8).

The fertilization of an egg actually takes place within one of the fallopian tubes itself, in an outer portion of it which is designated the "ampulla" (I T89-7 to 11).

2. THE DEVELOPMENT OF THE UNBORN CHILD IN THE FIRST EIGHT DAYS OF LIFE

During the first eight days following conception, the unborn child develops additional cells, descends from the fallopian tube, burrows into the lining of the uterus and there is an "interfacing" of the child and mother's circulation (I T89-14 to I T91-11).

It is while the child is in the early days of life that it (descriptively referred to as "the fertilized egg") begins to "divide" the numbered cells go from one to two, four, then eight and then sixteen. When the development of the child reaches the sixteenth

cell stage, the child is referred to by the biological term "morula" (I T89-14 to 25).

At this stage of development, the unborn child is approximately three days of age and proceeds into the uterus where it continues to divide and develop. By the sixth day, the early human being is actually in contact with the lining of the uterus which is known as the endometrium period as the division progresses and the baby attaches to the uterine wall. The developing human being is within the form of a cell mass referred to as a "blastocyst", which actually is in contact with the uterine wall. At this point there will shortly be a recognizable unborn child and the outer layer of cells, which is referred to as a trophoblast, will form the placenta (I T90-5 to 24).

As the blastocyst burrows into the lining of the uterus it erodes the maternal blood vessels and nexus begins to form between the mother and the child resulting in an "interface" between the mother's circulatory system and that of the child. It is at this stage of development, eight or nine days of age following fertilization, that the unborn child is detectable within the mother through normal testing methods (I T90-25 to I T91-15).

It is through the detection of a pregnancy hormone referred to as "beta sub unit HCG" that medical confirmation that there is a growing living human being within the maternal uterus is possible (I T91-14 to 22). During the first eight or nine days of the child's development this tiny member of the human race has exhausted its own stored up oxygen and nutrients. So at this age the bridge is established between the unborn baby and the mother and the baby begins to extract the nutrients and oxygen from her. In order to accomplish this link, the trophoblast (the outer layer around the blastocyst) actually scouts into the tissue of the uterus for blood vessels. The trophoblast has the power to open up maternal blood vessels which causes hemorrhaging around the baby. From the blood which is surrounding the child at that point the child begins to extract certain necessary nutrients, chemicals and even oxygen (I T92-1 to 18).

3. THE STAGES OF GROWTH OF THE UNBORN CHILD IS A SEAMLESS CONTINUUM FROM CONCEPTION TO BIRTH

The English language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. Consequently, there are terms to describe the particular "stages of growth". However, it was

emphasized at trial that it is important for one to understand that "stages of growth and development" of the new human being is really a "seamless continuum" (I T93-14 to 19).

Immediately upon conception the "fertilized egg" has been referred to as a zygot. At the age of three days the child has developed from a single cell to a sixteen cell individual termed "morula". The term "embryo" connotes the developing human being from the morulus stage to about the end of the eighth week following fertilization. The term "fetus" is used to describe the stage of the development of the human being from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth (I T93-20 to I T94-9).

The terms zygot, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being. Development of the person from the moment of conception is "seamless" with continuing growth and aging of the person from the moment of conception (I T94-10 to 22).

4. TECHNOLOGICAL DEVELOPMENTS SINCE 1976 (THREE YEARS AFTER ROE V. WADE) HAS RESULTED IN GREATER KNOWLEDGE OF THE

NATURE OF THE UNBORN CHILD IN THE EARLY STAGES AND HAS PERMITTED SOPHISTICATED SURGERY ON CHILDREN ONLY FOUR AND FIVE MONTHS AFTER CONCEPTION.

There were crude ultrasound devices that were available in the early 1970's dating back to its development in the 1950's. These instruments permitted limited access to knowledge about the child during the early stages of growth following conception (I T95-3 to I T96-15).

In 1976 there was a major development in technology called "real time ultrasound". Whereas the old technology showed static pictures, the new technology actually created a motion picture which could detect not only movement but function, breathing, urination, swallowing and other functions of the human existence (I T96-16 to I T97-16). It became possible to trace the development of the unborn person from literally the very beginnings (at conception) all the way through the child's development up to its birth. This technology, currently in color, permits detection of such things as blood flow through a fetus and embryo. Doctors using the instrument can actually see the red blood on the screen itself as the vessels transmit the flow of blood through the child's circulation (I T97-4 to 16).

This level of visualization permits examination and diagnosis of the child's illnesses while in its mother's womb. Medicine can watch how the child functions including such intricate detail as the operation of the tiny little valves and the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at the developmental stages of four and five months. It was not until 1990 that the first book was published describing this sophisticated fetal surgery in which the mother is anesthetized, her abdomen surgically opened and the uterus incisioned. In these operations the amniotic fluid is suctioned out and the baby is actually removed from the mother's uterus while he or she is still attached by the umbilical cord. The baby's abdomen or chest (whatever bodily organ is defected) is incised surgically, repaired, and the child is replaced into the mother's uterus, the amniotic fluid put back around the baby, and the mother repaired. The child is able to proceed through the pregnancy to, at or near full term (I T97-18 to I T100-1). These operations are done at relatively early stages of development of the child (I T100-6 to 9).

In addition to the development, since Roe v. Wade, of the sophistication of ultrasound technology, medicine has developed the additional modality of the electronic fetal heart monitor which permits sophisticated investigation of the fetus. The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music (I T103-18 to I T105-13).

5. THE FUNCTIONING OF THE UNBORN CHILD AT EIGHT WEEKS OF AGE POST CONCEPTION

The child at eight weeks is a clearly recognizable human being even to the human eye. The child's brain has formed (the child's brain continues to form following normal birth all through childhood and adolescence). An important fact is that at eight weeks the brain is producing a substance, "substance P", which is the "chemical messenger for pain" (I T105-16 to I T106-3).

The child at the embryonic stage of development has arms, legs, fingers and toes which are separate and distinct. The child has a nose and an external ear and, as Dr. Nathanson put it, the child "is, in fact,...quite obviously one of us" (I T106-4 to 8).

The child, in every way, is a human being that is very small in physiological terms. The child functions the same way that an

adult human being functions. The child at that age excretes urine, and its heart beats regularly as it had been since the age of three weeks following conception. The blood is circulating and brain waves have been isolated and detected for children which are eight weeks following conception. The child essentially does everything that an adult human being does but on a smaller scale (I T106-9 to 24).

6. DEVELOPMENTS IN IMMUNOLOGY DEMONSTRATE THE CHILD IS ALWAYS, THROUGHOUT ITS DEVELOPMENT FROM THE DATE OF CONCEPTION, A SEPARATE AND DISTINCT PERSON FROM THE MOTHER.

The pre-born child is always a separate person from the child's mother. Circulations are always separate and they never mix. In fact, if they do mix it can be lethal to the baby and even to the mother (I T106-25 to I T107-6). Although the relationship is symbiotic and an important one, the child is a separate and distinct person and is not a part of the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from its non-self, the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood cells actually recognize

parts of the mother as being the same human body to which it is a part. It also distinguishes a body that is not part of itself. If a foreign substance is put into a person's body the white blood cells will recognize it and immediately attack it in an "attempt to throw it out". The foreign body is not self. When the pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old following conception), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body (I T107-7 to I T108-18). Each one of us who were unborn babies have undergone this attack. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Graphically it stops the attack. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled which is the phenomenon that is referred to as "spontaneous miscarriages". A spontaneous miscarriage involves a person who is unborn but fails to survive

the attack by the mother's immune system (I T108-19 to I T109-14).

7. ONLY AFTER 1984, ELEVEN YEARS AFTER ROE V. WADE, DID MEDICINE UNDERSTAND THAT THE ABORTION OF THE UNBORN CHILD EVEN AT THE EARLY STAGES OF LIFE WITHIN THE MOTHER'S WOMB (INCLUDING AN EIGHT WEEK OLD CHILD) INVOLVES A BRUTAL, VIOLENT AND PAINFUL DEATH OF A HUMAN BEING

Mainly as a result of information learned during abortions that were performed after the Supreme Court decision in Roe v. Wade, it is now clear that the abortion of an unborn child, even at the early stages of the child's life following conception, involves a brutal, violent and painful death of a human being. It was not until 1984 that members of the medical profession began to document the abortion experience. In that year, Dr. Bernard Nathanson commissioned a doctor who was performing a legal abortion at a clinic to perform the abortion under ultrasound with the modern technology then available. During one day's work the commissioned doctor taped the ultrasound abortions of twenty-five to thirty human beings. A vivid depiction of one of the abortions was incorporated into a film entitled "The Silent Scream". As a result of the use of this technology in the taping of the abortion it

is documented that the unborn child is moving around in the womb - in the embryonic fluid. We now know from this technology that the unborn child begins to move within the embryonic fluid at the age of eight weeks.

In the abortion process the doctor puts an instrument into the womb to dilate the cervix. The doctor breaks the water and the embryonic fluid is permitted to flow out. Then the doctor uses a suction apparatus into the uterus. On the film it can be seen that the baby moves away from the suction apparatus. After the baby moves from the apparatus, the suction is turned on and a tremendous negative force is used to pull the baby from its living quarters.

In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart.

In this specific abortion filmed in 1984, Dr. Nathanson explained that the head of the baby was too large to be suctioned out so the doctor had to take a metal instrument called a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around the baby's head and then close the forceps. The film reveals that the child's head is actually crushed in the

process. It was not until 1984 that there was a reliable documentation of what actually occurs in abortion (I T109-21 to I T111-24).

Dr. Nathanson explained that he himself performed or supervised seventy-five thousand abortions. He indicated that these abortions were performed when the technology was not available (before 1972). During an abortion a human being's life is terminated (I T112-12 to I T113-20).

It is now clear that as a matter of fact, the abortion of an unborn child in its mother's womb subjects a human being to "unimaginable agony" and it ends the life of a person in the most barbaric and bloody manner possible (I T111-25 to I T112-8).

The unborn child's death and the pain to which it is subjected is documented in the movie "The Silent Scream". In the film it can be seen that the mouth of the young unborn baby is open. It is described as a dramatic, an arresting moment - a heart stopping moment - because it can be detected that the child was grimacing and was evidencing the most unimaginable agony that one can envision (I T122 to I T123-8).

C.

A PERSON (AND THE WORD "PERSON") CAN ONLY BE DEFINED AS A HUMAN BEING.

EMPIRICAL DATA SUPPORTS THE IRREFUTABLE CONCLUSION THAT THE LIFE OF A HUMAN BEING, AND THEREFORE A PERSON, COMMENCES AT CONCEPTION.

What constitutes a person and the definition of the word person is important to the rights of the Defendant in this case as is discussed in the four subsequent points. We are now able to remove some of the confusion concerning this term and the question of when life begins, which confronted the Supreme Court in the case of Roe v. Wade, 410 U.S. 113 (1973). There is a correct definition of the term that can be universally accepted and when applied to the empirical data leaves the irrefutable conclusion that a human being during pregnancy is a person and is such from the beginning of his or her life at conception.

1. UNDERSTANDING THE NEED FOR A DEFINITION.

In part the rights of the Defendant-Appellant in this case, Alexander V. Loce, and the merits of his constitutional challenge and affirmative defenses he raised, are dependent upon the definition of a "person". Fourteenth Amendment rights are extended only to "persons". A fact question material to this case was resolved in favor of the Defendant-Appellant by the Municipal Court Judge, as trier of the facts. He found that the life of a

human being begins at conception and that the unborn child is a person. Whether unborn persons enjoy constitutional protection is a separate inquiry; but that inquiry cannot be entertained without first determining this initial one.

The great American philosopher, William James, medical doctor and professor at Harvard University, was fond of telling the story about one of his hunting trips. James was a member of a hunting club and one Friday evening when he arrived at the club's cabin he was greeted with great enthusiasm. The six hunters who had arrived before him were in a greatly heated debate. Three of the hunters had argued one conclusion in the debate and the other three drew an opposite one. All six were delighted to see the philosopher arrive to break the tie.

The six hunters were arguing a question about a squirrel that one of them had encountered. The squirrel had clung to a tree with all four limbs so that his stomach was facing the tree trunk. The hunter was on the opposite side of the tree so that he and the squirrel could not see each other. As the hunter slowly circled around the tree, the squirrel traveled in the same direction at the same pace so that the squirrel was able to keep the tree between himself and the hunter. At all moments, their chests faced each

other. When the hunter completely encircled the tree without ever being able to visualize the squirrel (and the two were always stomach to stomach) the question arose, "had the hunter walked around the squirrel?"

Three of the hunters engaged in the debate argued that the hunter had walked around the squirrel. The other three were convinced that the hunter never actually walked around the squirrel because they were always stomach facing stomach. All six were anxious to hear which way Dr. James would vote.

But James surprised all of them by announcing that they were actually in agreement. He explained they would realize their agreement once they agreed on the definition of the word "around". If on the one hand the term "around" would be defined as the hunter going from the front of the squirrel to the side of the squirrel to the back of him and then returning to his other side and back to the front, then clearly the hunter did <u>not</u> go "around" the squirrel. If on the other hand one were to define the term "around" as going from the east of the squirrel to the north of the squirrel to the west of him to the south of him back to the east of the squirrel, then clearly the hunter did go "around" the squirrel.

James told this story to illustrate the point that people sometimes debate a point on which they would be in agreement if they carefully defined their terms. James' point has importance to the dispute before the Court. In Roe, the Supreme Court found it was not possible to make the finding of when life begins at that point in human knowledge (1973). That Court impliedly recognized the relevance of when life began, but felt, on its record, it could not be ascertained. The absence of this fact influenced it's judgment concerning the definition to be applied to the word "person" found in the due process clause of the Fourteenth Amendment and therefore the outcome of the case. The fact that the plaintiff's unborn child is a person is important not only to the rights of this plaintiff, but to the entire law which applies to legal questions concerning abortion.

It should be rather clear that the word person can only have one relevant definition and what actually constitutes a person is a question of fact. Whether an unborn child is protected by the Fourteenth Amendment due process clause first requires a definition of the word "person". A failure to first define the term is the precise failure of which Dr. James warned. A discussion of whether there is an express permissible exclusion or inclusion of

members of the class of persons[4] is conditioned by the determination of whether the unborn child is in fact a person.

The term person can only be defined after examining the empirical data. The opposite is preconception and prejudgment. For instance, some have defined a person as a thinking rational animal (but this excludes those who are too young, too feeble, or incapacitated). Some might suggest independence from an adult as a necessary trait (but children rely upon others to a very advanced age). Some, as the Courts have pointed out, have suggested a person is one who survives live birth (this has been specifically rejected by the Supreme Court in Roe v. Wade, and we know that unborn children vary greatly in post conception age at birth). No definition is satisfying unless it includes all members of the human race. A definition therefore must be determined to decide whether the defendant was defending a person, or human life which was his right or obligation.

2. THE DEFINITION OF A PERSON

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[4] The United States Supreme Court found that the rights of an unborn child depended upon this specific discussion. Roe v. Wade, 410 U.S. at 156 - 159, 93 S.Ct. at 728 - 730.

The first definition of "person" offered by Webster's dictionary[5] is as follows: "1. an individual human being, especially as distinguished from a thing or lower animal; ... 3. (a) a living human body;". But the court is not bound by a dictionary. The Court's definition must reflect reality as revealed by the record and science.

It is clear that we can not limit the term by age, by development, by whether the human being thinks well, can speak, can see, can hear, or has any particular or all of the traits of a normal functioning human being may have when fully developed and healthy. The term "person" must refer to all members of the human race.[6] Age, or completeness of human development is irrelevant. The term cannot be limited to adults, adolescents,

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[5] Webster's Deluxe Unabridged Dictionary, Dorset and Baber, Second Edition, 1983 at 1338.

"human" is defined as "a human being" at page 883

"humanness" is defined as "human quality" at page 884

"humanity" is defined as:

1. the fact or quality of being human; the peculiar nature of man by which he is distinguished from other beings. at page 884

"human kind" is defined as "the human species"

[6] Whether the Fourteenth Amendment intends to exclude some persons from its protections is a separate inquiry altogether.

children, infants, fetus' of full term, fetus' of short term, fetus' and embryo's upon which modern medicine can now operate or may be even be able to operate on in the future. It is now known that the life of a human being does not commence when a fetus "moves" or is viable. Such a concept is antiquated. As the record below indicates modern technology can detect the movement of a human being that is less than eight weeks old following conception. Who can rule out the possibility that future technology will detect "movement" at an earlier age.

A person must be defined as a member of the human species, one who possesses the essence of a human being. This definition includes all persons with the common characteristics enjoyed by each of us: the complete makeup of that "being" necessary to be an adult person when fully developed. The event of surviving birth is not that which makes a being human.

Any other definition would create the confusion of the hunting club and endless unresolvable debate.[7] One is a human being

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[7] If some define a person as a human being who has survived birth, while others recognize that the birthing process is not what makes a being human, there shall be endless unresolved debate over the rights of the human being unborn.

when one has what is needed to be a person and that is when one has the essence of a human being. The empirical evidence proves that that moment is immediately after conception, when a complete biological make up of the human being exists. This individual is a member of the human race, is a human being and is therefore a "person". It is, of course, the youngest person, the most vulnerable person and the person in greatest dependency upon its mother for nutrients and oxygen. But that simply means that the newly conceived person is a person most in need of protection. It is illogical to suggest that the vulnerability of the weakest and least powerless human being is cause to leave it without protection because it needs protection the most. Dependency does not alter its essence or nature, or deny that it is indeed a human being.

3. THE TESTIMONY OF DR. FRANCIS RUSSELL HITTINGER

Dr. Francis Russell Hittinger is an expert in philosophy. His testimony is offered to assist in defining "person". He observed that there can not be personhood unless there is first human beingness (I T146 to 4). He also offers a definition which is perfectly consistent with that offered by Webster: "a person is a human being" (I T144-25).

He testified that to arrive at a definition of the word "person" would require a review of the empirical data such as that given by Dr. LeJeune and Dr. Nathanson. Philosophy cannot create definitions, because definitions depend upon the empirical data available. It can assist in organizing thinking, but must first defer to the facts (I T142-2 to I T143-24).

There is no reason to exclude any individual human being from the definition of person. Every human being at all stages of development must be included because at all times they are complete. Otherwise distinctions would be either arbitrary or based upon concepts which are not empirically verifiable (I T144-24 to I T149-15). Finally, Dr. Hittinger addresses the term "potential life" found in Roe v. Wade. As he points out there must first be human life for there to be potential. The phrase would be a contradiction or oxymoron unless it is defined and understood as actual life that has the power to exercise those kinds of abilities that are unique to the particular species. But in that context the references to potential life must refer to an existing human being, an existing person. One can only be a potential human being, have the power to exercise the traits associated with humanity, if one is already human (I T149-16 to I T152-4).

Based upon the empirical data currently available through recent developments in the science of genetics and medicine, it must be concluded that immediately following conception there is in being a member of the human race, a human being that is complete in genetic material at the earliest stages of development of human life. It is irrefutable that life begins at conception and that the unborn child is a human being throughout pregnancy. All human beings are persons. As a matter of fact, and as a matter of definition, a human being is a person, and the unborn child immediately following conception is in fact a person.

POINT II

THE UNBORN CHILD ENJOYS CONSTITUTIONAL PROTECTION UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND UNDER ARTICLE I SECTION I OF THE CONSTITUTION OF THE STATE OF NEW JERSEY. PRONOUNCEMENTS TO THE CONTRARY FOUND IN ROE V. WADE HAVE BEEN TOTALLY UNDERMINED BY SUBSEQUENT DECISIONS AND EVENTS AND IS NO LONGER VIABLE LAW.

The recent developments in the science of genetics and medicine, together with recent changes in the law resulting in the modification of the United States Supreme Court decision in Roe v. Wade, 410 U.S. 959, 93 S.Ct. 1409, support the conclusion that as a matter of law the unborn child is a person that enjoys protection under the due process clause of the Fourteenth Amendment of the United States Constitution[8]. The unborn child also enjoys constitutional protection under Article I, paragraph I of the New Jersey Constitution of 1947[9].

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[8] That clause reads "nor shall any State deprive any person of life, liberty or property without due process of law".

[9] Article I, paragraph I of New Jersey State Constitution reads in pertinent part "all persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and

A.
THE INHERENT FLAWS AND THE RECENT MODIFICATIONS OF ROE V. WADE

In the United States Supreme Court decision of Roe v. Wade,[10] the Court concluded that "...the word 'person', as used in the Fourteenth Amendment, does not include the unborn". 410 U.S. at 158, 93 S.Ct. at 729. That legal conclusion was based upon: (1) a series of false assumptions now known to be such; (2) logical incongruities; and (3) legal pronouncements which have since been rejected by the current United States Supreme Court. As a result, this portion of the Court's holding in Roe v. Wade, supra, is no longer viable law.[11]

1. THE FALSE ASSUMPTIONS

The Roe Court neither possessed a record before it such as the one in this case, nor did it have the benefit of the relatively recent discoveries of modern genetics and science, which bear directly upon the question of when the life of a human being begins.

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defending life and liberty,..."

[10] See discussion at 410 U.S. 156 - 159, 93 S.Ct. 728 - 730.

[11] Part of the Court's holding which, involving the privacy right of a mother, remains law at this time.

Consequently, the Roe Court operated on a fundamentally false assumption: that one could not ascertain when life began (410 U.S. at 159-161, 93 S.Ct. 730, 731).

It is clear from the record in this case that there is only one conclusion that can be drawn: life begins at conception. However, the 1973 United States Supreme Court made two essential statements which no longer can be taken as accurate. First, the Court stated:

> "When those trained in respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

The first difficulty with this statement is that consensus is not needed. There is only one correct answer and when those with sufficient expertise are able to provide the empirical data necessary for a trier of fact to reach a conclusion a court is not free to absolve itself of the obligation of making a finding whatever the legal consequences. Second, it can no longer be said that this statement is true. Responsible, knowledgeable experts cannot credibly disagree with the testimony and findings of the Municipal Court judge in this case. To the extent that the statement of the Roe Court may have been true because of the "point in the

development of man's knowledge" in 1973, the statement is no longer true today.

The Roe Court made an additional statement which we now know to be false. With respect to the position that as a matter of fact the existence of life begins from the moment of conception, the Court stated:

> "Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a 'process' over time, rather than an event..."

The record in this case irrefutably contradicts these two false assumptions relied upon by the United States Supreme Court in 1973 in Roe v. Wade.

2. THE LOGICAL INCONSISTENCIES

(a) DEFINITION OF A "PERSON"

When the State of Texas argued in Roe v. Wade that the unborn child was a person within the meaning of the Fourteenth Amendment, the Supreme Court of the United States agreed that if "personhood is established, ... the fetus' right to life would then be guaranteed specifically by the Amendment." In rejecting the contention that the fetus was a person, the Court referred to the Fourteenth Amendment due process clause. Roe v. Wade, 410

U.S. at 157-160, 93S.Ct. at 729, 730. In arriving at the ruling the Court, as stated, did not understand when life began. This surely influenced its judgment. But in addition, the Court articulated a series of logical incongruities which seriously undermines its decision as precedent and partly accounts for Roe's subsequent and substantial modification.

The Roe Court ruled that the unborn is unprotected because there is no evidence within the constitutional document itself to support the conclusion that the framers intended to define "person" to include the unborn child (See, 410 U.S. at 156-159, 93 S.Ct. 728-730). The problems with this approach are multiple. Firstly, if the level and depth of knowledge of modern science forces us to recognize a broader definition of the word person we could not possibly expect to find such a definition in a document that was drawn in the Eighteenth Century. Secondly, it is illogical to conclude that because a definition is not contained within the document it was the intent to exclude any member of the human race from its protection.

The Court offered no expressly stated intention to exclude any members of the class of persons. Because past cases only involve persons after birth does not really indicate anything about whether

persons, found to be such before birth, as a matter of fact, are intended to be excluded. The clauses of the constitution referred to by the Roe Court do not provide evidence of intent to exclude an unborn child from due process protection.[12]

None of the court's considerations even address the question of whether the due process clause should apply. There is a total absence of such a discussion. Which brings us to a third and most ironic point. It would seem rather inappropriate to make an important determination based upon a failure to find intent to include the unborn in a privacy rights case. After all, the particular right, the right to privacy, under discussion is conceded by the Court to never be explicitly mentioned within the Constitution, 410 U.S. at 152, 93 S.Ct. at 726.

What this means is that the Court finds a right of privacy under the Constitution which is not found anywhere within it, but they deny the right of privacy to some members of the human race

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[12] It would seem obvious that no references would be found to an unborn child in clauses listing the qualifications for president, extradition, voting rights, fugitive slave clauses, and who qualifies for the Senate and Congress. These clauses, by their nature would not reflect upon the Fourteenth Amendment. See Roe vs. Wade, 410 U.S. at 157, 93 S.Ct. at 729.

precisely because they are unable to find a clear statement of the group of persons to whom this very right would extend.

This inconsistency leads to the inference that the Court was not sure that it was dealing with a human being at all. The resultant creation of a trimester system in which the State had an interest in the life of the unborn in the third trimester, but not the first two, reflects the ambivalence resultant from their need to protect what was obviously a human life on the one hand, but their lack of knowledge of when it began on the other.

Thus the fourth incongruity: if there was no human life there can not be any real state interest (see, Griswold v. Connecticut, 389 U.S. at 484, 485, 85 S.Ct. at 1681-1682 (1965)) yet they found an interest part of the time, not most. This particular contradiction has led to the modification of Roe discussed below.

In addition, the Court's reliance upon attitudes of the Nineteenth Century when knowledge such as that found in this record was unavailable seems misplaced. The United States Supreme Court had reserved to itself broad discretion in delineating the intent of the constitution and created a line of cases which provided a right of personal privacy, or guarantee of certain areas or zones of privacy. It was an expansive concept that developed

rapidly in the seven or eight years immediately preceding Roe v. Wade in cases such as Stanley v. Georgia, 394 U.S. 557, 564, 89 S.Ct. 1243, 1247 (1969); Terry v. Ohio, 392 U.S. 1, 8-9, 80 S.Ct. 1868, 1872-1873 (1968); Katz v. United States 389 U.S. 347, 350, 88 S.Ct. 507, 510 (1967), and of course, Griswold v. Connecticut, 381 U.S. at 484, 485, 85 S.Ct. at 1681-1682 (1965). In short, the Court that has the power and the will to create rights through their recognition in interpreting the Constitution is the very same, in fact the only Court, that would be the arbiter of the question to whom those same rights apply. It is inconsistent (and irresponsible) to suggest that the Court has the ability to define the privacy right that is not expressly stated, but cannot define the group to whom the rights apply because they do not find the definition within the Constitution itself (and fail to explain why some should be excluded).

Finally, there is a logical incongruity in the Supreme Court opinion in Roe v. Wade found in footnote fifty-four, 410 U.S. 157, 158, 93 S.Ct. at 729. The Court claimed that if the fetus enjoyed Constitutional protection then the Texas statute before it contained an inconsistency because it provided exceptions permitting an abortion for the purpose of saving the life of the mother. But this

is not an inconsistency, and the Court's statements concerning this provision of the statute is incorrect. The fact that the unborn child would enjoy protection under the Fourteenth Amendment does not mean that the child's right is absolute because the mother has a competing right. If the Court recognized a privacy right of a mother to make decisions about her own health and about her own life, surely a state would have the power to balance the considerations and permit a mother to abort a child if the mother's life depended on that very act. In fact, within the Roe v. Wade decision itself, the Court provides a considerable explanation why the mother's right to privacy under the Fourteenth Amendmont is not absolute and that it is subject to other state interests, specifically the state's interest in protecting "potential life" (see discussion at 410 U.S. at 159, 93 S.Ct. at 730; 410 U.S. at 155, 93 S.Ct. at 728). The Court specifically stated:

> "we, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against an important state interests in regulation", 410 U.S. at 154, 93 S.Ct. at 727.

Why would the right of an unborn child not be limited where the life of its mother is at stake? Even the right to life is limited. See, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909.

(b) THE COURT'S FAILURES IN DEFINING THE PRIVACY RIGHT OF THE MOTHER

The Court's discussion in Roe v. Wade concerning the nature and scope of the privacy right as it applies to a women's decision concerning abortion contains dramatic incongruities. The right to privacy of which the Court spoke dealt with a zone of privacy that was set forth in cases concerning marital intimacy, procreation, education, and matters of family life that were personal and "implicit in concept of ordered liberty" 410 U.S. at 152, 153, 93 S.Ct. at 726, 727. Without any discussion for the basis for the conclusion the Court leaps from the right to use contraception devices in Griswold, supra to the conclusion that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" 410 U.S. at 153, 93 S.Ct. at 727. It does not define the scope of this right. That is to say, it does not address the question of whether, in the absence of competing rights, it is absolute. It does not follow that a right of privacy which includes decisions by couples to prevent

pregnancy, Griswold v. Connecticut, 381 U.S. at 484 - 485, 85 S.Ct. at 1681 -1682, supports the conclusion that a woman has the right to terminate the life of another human being simply because the human being is dependent upon her.

The Court lists four harms that could befall the mother to justify the conclusion that the privacy right would include the decision to terminate a pregnancy. The first of these, concerns the health and life of the mother herself. To the extent that one could say personal judgments about a mother's health where a mother's life is in danger, is a decision that is logically included in the right of privacy as set forth in the prior case law is undoubtedly sound. It is based upon the right of the mother not only in judgments of privacy, but to her fundamental right of life itself.

However, other concerns about pregnancy do not justify the act of aborting a child based upon the right of privacy. We only need examine the other harms listed by the Roe Court: 1. maternity or additional offspring may force upon a woman a distressful life and future; 2. mental and physical health may be taxed by child care; 3. distress associated with an unwanted child; and 4. additional difficulties and continuing stigma of unwed motherhood.

That these are legitimate concerns that implicate the right of privacy there is no doubt. We believe that a mother carrying a child conceived out of wedlock is entitled to compassion and a measure of understanding. Society should support all of her legitimate concerns and any effort necessary to assist her in keeping her and her child together, if that is the course she chooses. But the concerns listed by the Roe court are reasons to avoid pregnancy, and the state would not have a compelling interest to interfere with the private choice of a woman or a couple to take steps to prevent pregnancy. The right of a woman and couples to prevent pregnancies, however, was well established. See, Griswold, supra. The right to use contraceptives to prevent pregnancy is sufficient to satisfy this right. The four reasons noted above are not reasons to permit the destruction of the life of a human being where the mother or couple decline to exercise their right to use contraceptives granted them under Griswold.

In addition, if these were truly reasons to abort a child, then the natural father would have a right to demand an abortion. All of these inconveniences and embarrassments are experienced by him when the law calls upon him to meet his obligations, even where the child is born out of wedlock.

It also cannot be said that there is anything private about the mother's decision. Unlike the activity found in the other privacy cases, an abortion does not take place in the privacy of one's home, but in a clinic that has a staff. The necessary degree of involvement by general society is too great to suggest that there is no interest of the populous in the conduct. We are all implicated in the abortion activity when we are forced to create the medical support to see that it is safe. The people of the state give material assistance to the act as licensors and regulators of the doctors, nurses and clinics. In short, it is not the kind of conduct that could be said to be privately conducted like the other types of activity traditionally protected by the privacy right.

Further, it should be added, why would one expect that they could take the life of their own child and others in society would assist in the endeavor just because the mother or the couple seek to avoid the embarrassment or stigma they should anticipate is the natural consequence of their failure to exercise their Fourteenth Amendment Griswold rights? At some point the question of the reasonableness of the expectation is a material consideration in determining if the expectation of privacy is constitutionally

protected. See, California v. Greenwood, 108 S.Ct. 1625, 1628 (1988).

It is insufficient to say, as the Roe Court did, that we must reject the argument that one has the right to do whatever one wants with their bodies. More to the point, as the record in this case finally concludes, the body she seeks to expel is not her own.

The combination of a woman's and a couple's Griswold rights to prevent pregnancy and the privacy rights of a mother to seek and obtain an abortion when her own life is at stake (making it a true medical decision) would seem to be reasonably sufficient to meet the privacy concerns listed by the Court. There is one other concern we might add. Does a woman have a legitimate privacy right to involve the decision of abortion in cases where she has been raped? Where there is a true rape, the answer is probably yes. After all, the Griswold privacy rights have been denied her. At this point, however, there is no need to discuss whether competing interests with that of the mother under such circumstances would outweigh hers.

3. THE MOST IMPORTANT ASPECTS OF ROE V. WADE AS LEGAL PRECEDENT HAVE BEEN MODIFIED AND FUNCTIONALLY REVERSED IN MOST AREAS.

The heart of the Supreme Court's determination in Roe v. Wade is that there is a point in a pregnancy when a state has no compelling interest to either regulate or prohibit abortion where either is based upon the state's concerns for the life of the child:

> "With respect to the state's important and legitimate interest in potential life the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb". 410 U.S.at 163, 93 S.Ct.at 732.

The Roe Court therefore acknowledged a legitimate and compelling state interest in preserving the life of the child in the third trimester, but denied such an interest prior to that time. The reasoning for the distinction was that prior to the third trimester the child is in greater dependence upon mother. This is the reverse theory of all fundamental constitutional protection. Usually the Courts are interested in protecting those who are least able to assert themselves. E.g., Santotsky v. Kraemer, 455 U.S. 745, 102 S.Ct. 1388 (1982). To say that a state has no interest in protecting the life of those who most need the protection is inconsistent with modern American jurisprudential principles. It is a particularly cruel irony that a natural parent, who is discharged in law and in nature to be an individual with the greatest

obligations for the safety, health and welfare of a child, would become the only one with the power to destroy the child's life.

The trimester system and the state's lack of a compelling state interest in potential life prior to the third trimester has been rejected in subsequent opinions. In Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) the plurality wrote:

> "...we do not see why the state's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability". 109 S.Ct. at 3057.

The Court cited the dissent in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169 (1986), with approval:

> "The state's interest, if compelling after viability, is equally compelling before viability." Thornburgh 476 U.S. at 794, 106 S.Ct. at 2197.

The plurality in Webster was written by Justice Rehnquist, joined in by Justices Kennedy and White. Justice Scalia wrote a concurring opinion which supports their conclusion. Justice O'Connor on more than one prior occasion concurred in the statement found in Webster. In 1983 she dissented in the case of Akron v. Akron Center for Reproductive Services, 462 U.S. 416,

(1983) in which she wrote that the trimester system "cannot be supported as a legitimate or useful framework" Akron, supra at 454 (O'Connor, J. dissenting). In her dissent in Thornburgh v. American College of Obstetricians and Gynecologists, supra, Justice O'Connor expressed precisely the same sentiment as set forth in the Webster plurality:

> "I will remain of the views expressed in my dissent in Akron. The state has compelling interests in insuring maternal health and in the protecting of protecting of human life throughout pregnancy."

Thus, the most important principle of Roe v. Wade has been subsequently deleted and effectively reverses the case.

The inherit flaws in the rationale of Roe has resulted in its demise as legal authority. The Webster statement simply points out one of them: if there is potential life of a nature that a state has a compelling interest in protecting it at any time during pregnancy, then the interest is throughout it. The cause of the conflict rests with the Roe Court's inability to recognize when life began. The Roe Court knew there was life before actual birth and it could be protected, but failed to recognize life that is obviously human. Such reasoning was bound to be later rejected.

In part, the rejection of the Roe viability line reflects the lack of respect the decision has always received. It has been a divisive force in our society for almost twenty years. It is divisive because it defies the human spirit, denies human nature, creates injustice, and denigrates the dignity of life.

As long as there are those who respect human life, those who love justice and those who possess the vitality of the human spirit, Roe v. Wade shall continue to receive little respect.

B.

THE STATE HAS A COMPELLING STATE INTEREST THROUGHOUT PREGNANCY TO PROTECT THE LIFE OF THE UNBORN CHILD. THE SUPREME COURT OF THE UNITED STATES HAS INFERENTIALLY FOUND THAT THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION.

Between the dissenting opinion of Justice Scalia in Webster 109 S.Ct. at 3064, Justice O'Connor's dissents in Akron, supra and Thornbourgh, and with the plurality opinion of the Court in Webster announced by Chief Justice Rehnquist and joined in by Justices Kennedy and White, the Roe trimester framework has been discarded. But more significantly, it is clear that the nature of the State's interest is compelling before "viability" and "throughout pregnancy" 109 S.Ct. at 3057.

The plurality in Webster cited with favor the statement by Justice O'Connor in her dissent in the Thornbourgh case that "a state has a compelling interest in insuring maternal health and in protecting potential human life, and these interests exist 'throughout pregnancy'". See Webster, 109 S.Ct. at 3057.

The Webster Court rejected the Roe Court's contentions concerning the nature of the state's interest prior to "viability". The difference between the two views, it may be inferred, rests with a difference in the views of the nature of the child itself. For a different interest to exist before and after "viability" would require a difference in the nature of the life. When the Webster Court found that the state's interest must be the same, it was because they found that the "potential life" subject to the interest was the same. The nature of the unborn child after viability in Roe was the same nature before viability in Webster.

The difference is primarily attributable to the Roe Court's confusion over when life begins and the true nature of the early human being. The refusal by the court to clearly define what they were dealing with led to divisiveness and error.

Whatever the undefined life the Roe Court believed it was dealing with that justified state protection was now found to exist

throughout pregnancy, and, effectively the Webster Court has found that the life of a human being starts at conception. This conclusion must be reached for a number of reasons.

First, the Roe Court held the state had no regulatory interest in unborn life prior to viability because it believed that life's commencement was speculative. A state's interest in life required a clear existence of life. Webster's pronouncement that the state's interest was compelling from conception implied, therefore, recognition of life's commencement, actually and legally, at conception. Second, it should be observed that the Roe Court never denied that the unborn child, after viability, was a human being, a person. The Court confined its discussion of personhood to its relevance to the fourteenth amendment and its pronouncement that there was no constitutional protection. Third, by express statements and inference the Roe Court acknowledged that after viability there was human life concerning which a state's interest was compelling. The description of the unborn child's capability to live independent of the mother was an express acknowledgment of the child's personhood. The use, by the Roe Court, of the term potential does not infer non-being. The express statement supports the

conclusion that it is a being, a person in being. That the third trimester unborn child is a human being was self evident even to the Roe Court.

The word "potential" did not imply non-life. The Court ruled that the state had no interest in preserving non-life, while it had "potential" to be life in Griswold v. Connecticut, 381 U.S. 485 (1965) which extended constitutional protection to contraceptive use. In Webster, all nine Justices confirmed the Griswold protection to prevent life. See Webster, 109 S.Ct. at 3057, 3059, 3072, 3081. Put another way, there is no legitimate state interest to protect life if the life is not actual.

The term "potential", as used in Roe and Webster, must refer to the potential of the human being having a life after birth. It is not a denial that the unborn child is a living person. It is the ovum and sperm prior to conception which possesses qualities of potential. In other words, the privacy right enunciated in Griswold is designed to extend the couples choice to prevent creation of life.

Fourth, the event of conception is legally significant because of the Webster case. The state's compelling interest exists throughout pregnancy, but not prior to conception. The state

therefore has a compelling interest in this stage of human life, whether or not the court used the term "potential" life.

All this leads to the conclusion that the current Supreme Court has found that protectable human life begins at conception.

C.

THE UNBORN CHILD ENJOYS PROTECTION UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT. THE STATE'S COMPELLING INTEREST TO PROTECT THE UNBORN CHILD THROUGHOUT PREGNANCY ONLY EXISTS BECAUSE THE CHILD ITSELF HAS A PERSONAL AND EQUAL RIGHT.

Under the facts established in this case and the existing law of Webster, supra, there can be little doubt that the life of the unborn child enjoys protection under the due process clause of the fourteenth amendment of the United States Constitution. This principle is first established by the existence of a state interest which can only co-exist with a protectable personal interest of the class to which the state's interest attaches, and the irrefutable personhood of the unborn child requires protection under the due process clause because there would exist no compelling interest to exclude them from protection as a class.

1. THE STATE'S INTEREST CAN ONLY CO-EXIST WITH THE PERSONAL INTEREST OF THE INDIVIDUALS IT SEEKS TO PROTECT

The existence of a compelling state interest throughout pregnancy depends upon a corresponding interest possessed by the persons who are the object of the state's interest. The implications of the Webster ruling is that the unborn child has a personalized interest. If the state has the power to protect the life of a person, the person must have a personal corresponding right. The state's interest can only be co-existent with the interest of the person it seeks to protect. The nature of the state's interest is its parens patriae interest (or one so closely aligned with it to be indistinguishable). See, Santosky v. Kraemer, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982), defining the state's interest in terminating constitutionally protected parental rights of an infant's parents as the parens patriae interest in preserving and promoting the welfare of the child. Where the parens patriae powers are used to assert the interest of the child, even fundamental constitutional rights of the parent may be defeated. Santosky v. Kraemer, supra. The parens patriae interest of a state cannot exist without a co-existing personal right of the individual person being protected. C.f. Snapp v. Puerto Rico, 458 U.S. 592, 600, 102

S.Ct. 3260, 3265. Parens patriae refers traditionally to the role of a state as sovereign and guardian of persons under legal disability. Snapp v. Puerto Rico, 458 U.S. at 600 [n.8], 102 S.Ct. 3260. It is "often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves". Mormon Church v. United States, 137 U.S. 1, 57, 10 S.Ct. 792, 808 (1890). Whereas the parens patriae interests for certain "actions" may require the state to possess its own quasi-sovereign interests to exercise it (see Snapp v. Puerto Rico, 458 U.S. at 600 - 603, 102 S.Ct. 3265, 3266) it is clear that the interest must be concurrent. See, Raleigh Fitkin - Paul Morgan Mem. Hospital v. Anderson, N.J. 421, 423 (1964).

In Raleigh Fitkin v. Anderson, supra., the Supreme Court of New Jersey held that the state had an interest in protecting the life of an unborn child. The right was personalized to the unborn child and a guardian ad litem was appointed by the court. 42 N.J. at 423, 424. Prior to announcing the appointment of the guardian (who stands in the place of the child), the court specifically stated "the unborn child is entitled to the law's protection..." 42 N.J. at

423.[13] See also, Jefferson v. Griffin - Spalding County Hospital Authority, 247 GA. 86, 274 S.E 2d 457 (1981) (finding that an unborn child has a right to life). Taft v. Taft 388 Mass. 331, 446 N.E. 2d 395 (1983). (Recognizing the life of an "inviable" unborn child may provide a compelling state interest). The nature of the state's parens patriae jurisdiction is such that if the individual's rights did not exist, the state would have no interest.

The Webster court's pronouncement that a state has a compelling state interest throughout pregnancy infers that the unborn child has a possessory interest in the preservation of his own life. See, Rubenfeld, "On the legal status of the proposition that 'life begins at conception'" 43 Stanford L. Rev. 899 (Feb. 1991).

2. THE FACT THAT THE UNBORN CHILD IS A HUMAN BEING, A PERSON, REQUIRES PROTECTION UNDER THE DUE PROCESS GUARANTEE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION I OF THE NEW JERSEY CONSTITUTION.

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[13] Influenced by the portion of the Roe decision modified in 1989 by Webster, the New Jersey Supreme Court's holding in Right to Choose v. Byrne, 91 N.J. 287, 306 was contra. But, this holding would no longer be valid following Webster.

The fourteenth amendment of the Constitution of the United States, states in part: "nor shall any state deprive any person of life, liberty, or property, without due process of law". It was acknowledged by the Supreme Court in Roe v. Wade that if the clause applied to an unborn child, the unborn child's right to life would be specifically guaranteed by the amendment. But it is now clear from the new developments in the sciences of genetics and medicine that in fact we are dealing with a person from the moment of conception, the Webster court has effectively held as much, and the interests of the state commencing at conception infer the existence of like rights in the unborn child.

There is nothing either in the specific language of the fourteenth amendment nor anything anywhere else in the constitution that would suggest that the group of persons referred to are limited by age or stage of development of human life. In fact the actual words "any person" is all inclusive. The word "any" is expansive and includes "each and every".

This conclusion is compelled by the following: (a) the unborn child is a human being and a member of the human race and therefore a "person"; (b) the empirical data which supports the conclusion that the unborn child is a person was not fully

appreciated at the time of Roe v. Wade; (c) the legal development found in Webster, supra which expands the interest of the state is in part derivative from the fact that the child exists, has a life of his or her own, and (d) the right to life of any person is considered unalienable.

The Supreme Court of New Jersey has recognized that the policy within our state is that life is more precious than non-life. In Berman v. Allan, 80 N.J. 420 (1979), Justice Pashman wrote:

> "One of the most deeply held beliefs of our society is that life - whether experienced with or without a major physical handicap - is more precious than non-life (citation omitted)... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the sanctity of life. The federal constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law... are own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947) Art. I, Sec. I. The Declaration of Independence states that the primacy of man's 'unalienable' right to life is a 'self evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped human beings." Berman v. Allan, 80 N.J. at 429.(emphasis added)

A corollary to that statement is that nowhere in these documents is there to be found an indication that the lives of the

most dependent human beings are less cherished or less protected than those fully developed. As we have seen, the state's parens patriae powers are designed to help those individuals who can least help themselves. Surely the power includes those who are most in need of the protection.

Equally important is that there is no legitimate interest on the part of the state to exclude one group of persons from the protection. Without a compelling state interest to exclude the class of unborn persons such a classification itself would be unconstitutional where a fundamental right would be deprived or impaired. Dunn v. Blumstein 405 U.S. 330 (1972); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23 (1968); Baker v. Carr, 369 U.S. 186 (1962); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. Illinois, 351 U.S. 12 (1956).

No court is permitted to ignore the factual reality of the record in this case. An abortion of the plaintiff's unborn child is the death of a human being. Our current knowledge of genetics and medicine leads to the irrefutable conclusion that Mr. Loce's child is a person. The Supreme Court of the United States has reconsidered fundamental constitutional standards when the

passage of time has eroded the basis of its prior rulings. Most notably in Brown v. Board of Education, 347 U.S. 483 (1954), the court overruled the case of Plessy v. Ferguson, 163 U.S. 537 (1896), because the court found the current state of human knowledge regarding the psychological impact of segregation in schools upon minorities altered one of the assumptions on which Plessy relied. The court stated:

> "Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by the record. Any language in Plessy v. Ferguson contrary to this finding is rejected."

The fundamentally false assumptions of the Roe court require a rejection of its ruling that the fourteenth amendment did not protect persons who are yet unborn following conception. Whatever the prevailing view of what constitutes a person in fact expands based on human knowledge it must overtake an antiquated fiction of law. (Compare, Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) with Brown v. Bd. of Ed., supra.)

Person can only mean human life, and the fourteenth amendment means all human life is entitled to its preservation. This is a moral imperative dictated by the essence of the life clause itself.

POINT III

JOHN DOE, AS THE NATURAL GENETIC FATHER HAS THE STANDING TO RAISE THE CONSTITUTIONAL RIGHTS OF HIS UNBORN CHILD. HE ALSO POSSESSES HIS OWN PERSONAL FUNDAMENTAL RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

When John Doe seeks court intervention on March 7, 1992, and acts to defend the life of his child, he does so in his status as natural father, acting for the child, and on his own behalf to protect his own fundamental rights under the fourteenth amendment of the United States Constitution.

The special relationship Mr. Doe enjoyes with the unborn child gives him standing to raise the constitutional rights of the child. In addition, Mr. Doe possesses his own fundamental rights.

A.
THE SPECIAL RELATIONSHIP BETWEEN MR. DOE AND HIS CHILD BASED UPON THE FACT THAT HE IS THE NATURAL GENETIC FATHER GIVES HIM UNIQUE STANDING TO RAISE THE INTERESTS OF THE CHILD.

1. AS THE FATHER OF THE CHILD, MR. DOE'S OWN INTERESTS ARE INTERTWINED WITH THAT OF THE CHILD'S AND MUST BE CONSIDERED IN THE MATTER OF STANDING.

The dissent in Planned Parenthood of Central Missouri v. Danforth 420 U.S. 52, 92, 93, 96 S.Ct. 2831, 2851, 2852 (1976) (written by Mr. Justice White, joined in by Mr. Justice Rehnquist and then Chief Justice Berger) recognized the right of a father to receive notice of an anticipated abortion of his unborn child. Because the majority in that case operated under the Roe ruling, since rejected by Webster, that the state did not possess a compelling interest prior to viability, the majority found that the father of the unborn child could not have an interest in receiving notice of an abortion. Because of the holding in Webster, the majority ruling in Danforth is no longer valid law and can no longer be considered a precedent to deny a father's standing.

However, even in 1976, only three years after Roe v. Wade, the three dissenting justices concluded that the father's standing to receive notice and take action to preserve the child's life was grounded in his own fourteenth amendment rights, stating:

> "It (his right to receive notice of the intended abortion) is instead recognizing that the husband has an interest of his own in the life of the fetus which can not be extinguished by the unilateral decision of the wife... the father's interest in having a child - perhaps his only child - may be unmatched by any other interest in his life. See Stanley v. Illinois 405 U.S. 645, 651, 92 S.Ct. 1208, 1212,..."

When analyzing the standing of Mr. Doe to raise the rights of his child, the court must incorporate into the considerations not only his unique status to the child as set forth below, but the father's own rights. The rights of the two are interwoven. Because of Webster the statements of the majority in the Planned Parenthood v. Danforth case may no longer be considered viable law.

2. MR. DOE'S STANDING UNDER THE PRINCIPLES ENUNCIATED IN GRISWOLD V. CONNECTICUT.

In Griswold v. Connecticut 381 U.S. 479, 85 S.Ct. 1678, the United States Supreme Court held that the Appellants, the executive director of a Planned Parenthood League of Connecticut and a defendant who is a licensed physician had standing to raise the constitutional rights of married couples who they served. See, Griswold v. Connecticut, 381 U.S. at 481, 85 S.Ct. at 1679, 1680. In Griswold, the appellants were convicted of violating the Connecticut birth control law and the court's analysis supports standing for Mr. Doe to raise the constitutional rights of his child. In Griswold, the relationship of the defendants to the couple whose rights were being asserted was the controlling factor,

particularly where it could be said that the defendants are serving the individuals possessing the constitutional interests.

In support of this principle, the court cited Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (where an employee was permitted to assert the rights of his employer); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (where the owners of private schools were entitled to assert the rights of potential pupils and their parents); and Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (where a white defendant, party to a racially restrictive covenant, was being sued for damages by the covenantor because she had conveyed her property to negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective negro purchasers to equal protection, although no negro was a party to the suit). Griswold v. Connecticut, 381 U.S. at 481, 85 S.Ct. at 1680.

The relationship between a father and a child, even an unborn child, has enjoyed traditional recognition in the law. Even aside from the constitutional considerations (set forth below) a father has traditionally enjoyed standing to protect the interests of his children. A parent, in New Jersey, is the natural guardian of the interests of his child. See R. 4:26-2 (recognizing the natural parent

is the only guardian to represent the interest of a child in a law suit who need not be appointed by court order). The relationship of a father to a child born out of wedlock gives rise to rights and obligations on the part of a father independent of the nature of his relationship with the child's mother or even the child. See, N.J.S.A. 9:17-40, et. seq. (the New Jersey paternity statute) which extends the obligation of a natural father to support a child born out of wedlock and grants him paternal rights, including the right to be the primary custodian of the child. Under the New Jersey guardianship statute, N.J.S.A. 3B:12-12 and accompanying case law, the guardianship for nurture vests in a father, and this "natural guardianship" was for bringing up and taking care of the child. Caruso v. Caruso, 101 N.J. Eq. 350, 139 A.H. (1928). The New Jersey statutory scheme for intestate succession creates rights in both the father and child who inherit from one another based only upon a genetic relationship. See, N.J.S.A. 3B:5-2.

Perhaps more importantly, the standing of a father to protect the interests of his natural child could not be constitutionally withheld from him. Both the father and the child possess a constitutionally protected interest and companionship with one another. Santosky v. Kramer 455 U.S. 745, 102 S.Ct. 1388

(1982). The protection of this relationship requires extending to the father the standing to assert the child's interests. The obligations of the father to protect the child's health and welfare require his raising the rights of the child, because the child has a legal impediment or inability to raise his own rights. The state's prevention of the natural father raising the child's rights would itself impermissibly interfere with them. The rights of both the child and the father cannot be defeated because third parties have acted to destroy the life of the child and therefore the relationship. All rights of the child could be destroyed by simply stating that a father's relationship has not ripened sufficiently, and the very ripening of the relationship can be frustrated by the act of terminating the life of the child.

Perhaps the most compelling reason for recognizing the father's standing (with the exception perhaps of the right being part of his constitutionally protected relationship) is the fact that in the abortion context no one else who also has standing has acted to protect the interests of the child. The mother, who has protected rights with respect to her child, including the unborn child, Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 1985 (1983), here, not only refuses to exercise her rights, but is actually the

party seeking to terminate its life. On the other hand, the state of New Jersey which has the power to exercise its parens patriae jurisdiction to protect the child, has refused to perform its obligation. It would be a constitutional deprivation of the child's constitutional rights, once recognized, to fail to extend the standing to the father under such circumstances. C.f. Santosky v. Kramer, 455 U.S. at 760, 102 S.Ct. at 1398 where the Supreme Court expressly recognized that the fundamental rights which protect the parent - child relationship are shared by the child: "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship". Abortion does just that in the most final way.

Once it is recognized that the unborn child is a human being, a person, it is difficult to imagine a more arbitrary violation of this fundamental constitutional right then when a child's life is terminated for no reason other then the inconvenience and embarrassment to one parent, where the mother's real interest in life is not present. The denial to the father of standing under these circumstances would be a deprivation of both the father's constitutional rights and those of the unborn child.

B.

THE PLAINTIFF IN THIS CASE POSSESSES HIS OWN FUNDAMENTAL RIGHTS UNDER THE FOURTEENTH AMENDMENT INDEPENDENT OF THOSE OF ITS CHILD. IN ADDITION, THE CHILD POSSESSES ITS OWN RIGHT TO ENJOY THE RELATIONSHIP WITH HIS FATHER AND THE FUNDAMENTAL RIGHTS OF EACH ARE SYMBIOTIC.

Mr. Doe enjoyes fundamental constitutional rights under the fourteenth amendment which protected his relationship with his unborn child. There is actually a bundle of rights that all come together in the relationship when it is threatened by abortion. It involves Mr. Doe's fundamental constitutional rights: (a) to his continued companionship with his child Santoksy v. Kramer, 455 U.S. 745, 102 S.Ct. 1388; (b) to procreate, Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942); and (c) to discharge his obligations to his child and the corresponding personal liberty and freedom to make decisions about the welfare of his child, Pierce v. Society of Sisters, 268 U.S. 510, 518 (1924). Individually each extend a separate fundamental liberty interest to Mr. Doe. Collectively they delineate the constitutional dimensions of his relationship with his child, and constitute a set of rights which protect the relationship itself in all its aspects and interests including the Santosky rights of the child.

1. MR. DOE ENJOYS THE FUNDAMENTAL RIGHT TO CONTINUED COMPANIONSHIP WITH HIS CHILD AND UNDER SANTOSKY THE UNBORN CHILD POSSESSES A SECOND FUNDAMENTAL CONSTITUTIONAL RIGHT, A LIBERTY INTEREST IN THE RELATIONSHIP WITH HIS OR HER FATHER.

At the time of Planned Parenthood v. Danforth, 420 U.S. 52, 96 S.Ct. 1831, in 1976, the court was operating under the Roe trimester system by which a state did not have a compelling interest in life of the unborn child prior to viability. As a result, both the majority and the three judge dissent felt compelled, under Roe, to refuse to recognize the father's standing to raise the child's rights (because under Roe the child had none prior to viability). As we have seen, that is no longer the law under Webster and rights extend directly to the child.

However, even at the time of Danforth in 1976, Justices Rehnquist, White and Burger all found that standing existed for the father based upon his own constitutional rights. This is significant because under Roe there was no recognized human being in existence prior to viability. It represents compelling authority under the current state of the law since Webster.

The Danforth dissent stated:

> "...the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife. It but by no means follows, from the fact that the mother's interest in deciding 'whether or not to terminate a pregnancy' outweighs the state's interest in the potential life of the fetus, that the husband's interest is also outweighed by and may not be protected by the state. The father's interest in having a child - perhaps his only child - may be unmatched by any other in his life. See Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 2d 551 (1972), and cases cited." Planned Parenthood v. Danforth, 428 U.S. at 93, 96 S.Ct. at 2852.

Since the Danforth dissenting opinion, the Supreme Court h

further expanded the fundamental constitutional right to which t

dissent referred. Stanley was decided by the court in 1972 a

involved an unwed father whose relationship with his child w

terminated by the State of Illinois. In Stanley, the court reject

the concept that the failure of the father to have "a lega

relationship defeated his rights based upon his natural a

biological relationship with the child stating:

> "The private interest here, that of a man in the children he has sired and raised undeniably warrants deference and, absent powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this court with the momentum for respect lacking when an appeal is made to liberties which derive merely from shifting

economic arrangements'". 405 U.S. at 651, 92 S.Ct. at 1212.

The right defined in Stanley, that of a parent's interest in the companionship, care, custody, and management of his or her children, was found by the Stanley court to be "cognizable and substantial". In case law subsequent to Danforth, the court refers to this right as "fundamental" requiring for its extinguishment a compelling state interest. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982). However, it might be said that there is a different standard imposed where the father is not married to the child's mother when compared to a traditional family setting where the child is born within wedlock and the mother and father are living together. Compare Santosky, with Stanley.

However, the dissent in Danforth was firm in their statement that the protected interest of a father was fundamental, that is sufficient to require a compelling state interest to overcome it, and it outweighed that of the mother in the context of an abortion. 428 U.S. at 93, 96 S.Ct. at 2852. A comparison of pertinent case law reveals that the difference between the two standards rests upon the efforts of the father to establish his relationship, and, the difference between a father who wishes to preserve the life of the

child, when weighed against the efforts of others who have standing to compete with the father's interests.

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, (1978), decided after Danforth, explains the distinction and under what circumstances the court would apply the strict scrutiny test instead of that used when the right is considered a "substantial interest".

Quilloin involved an unwed father. The Court stated:

> "We have little doubt that the due process clause would be offended 'if the state were to attempt to force the break up of the natural family, over the objections of the parents, and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest' Smith v. Organization of Foster Families, 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119 (1977). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family already in existence, a result desired by all concerned, except appellant." Quilloin v. Walcott, 434 U.S. at 255, 98 S.Ct. at 555.

This explanation in Quilloin supports the reasoning of the dissent in Danforth which would give fundamental status to the rights of the father of an unborn child, yet permit the less than

fundamental status of the right in situations such as Stanley and Quilloin (where it was found that "best interests of the child" standard was sufficient to terminate a father's rights rather than the "unfitness standard" found in Santosky). It also explains the difference in the treatment of the father's right in Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985 (1983) (where the fundamental right of a mother to continued companionship of her child whom she carried and to whom she gave birth were greater than that of the father where he never married the mother and never established a relationship with the child), as well as Michael H. v. Gerald D., 109 S.Ct. 2333 (1989) (where a California statute was upheld on constitutional grounds against the challenge by a man who was concededly a biological parent of a child born to a married woman where the married woman and her husband sought to preserve their relationship with the child).

The dissent in Danforth simply applied the Quilloin criteria and concluded that the natural father's right to continued companionship with his child, citing the father's right found in Stanley v. Illinois (where the child was born out of wedlock and the father had not married the child's mother). In Danforth the dissent undoubtedly relied upon the fact that, in the abortion

situation we are not dealing with an unwed father who never sought actual legal custody of his child. In the Danforth hypothetical the father was seeking an opportunity to assert that right, not a father who failed to. In the current case, Mr. Doe used every legal avenue available to him to assert his rights, but was denied them. In fact, Mr. Doe was the only person with responsibility for the child who sought to protect the child at all. This brings us to the second prong of the Quilloin test, the question of whether there is an existing family unit seeking to protect, nurture and care for the child. In Stanley there was not, and the rights of the father were upheld. In the Danforth context there would not have been. In this case, not only was there an absence of care and nurturing for the child on the part of any other family but the others who spoke, the mother and the state, failed to compete for custody, but actually sought, and succeeded in, the destruction of the child's life.

When all these factors are taken into consideration,the natural father is the only "natural family" of which Quilloin speaks and that relationship between the father and the child would be protected under the Santosky standard. But as Santosky makes clear, it is not just the father's right that is involved, but the right

of the child to preserve his or her relationship with his natural father. It is a symbiotic relationship that under the circumstances existing in the abortion context become so interwoven as to take on the rights of the family which are traditionally extended by the fourteenth amendment liberty interests found to be fundamental. Santosky v. Kramer, supra, Quilloin v. Walcott, supra; see also Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925), Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944).

2. MR. DOE'S FUNDAMENTAL CONSTITUTIONAL RIGHT TO PROCREATE WOULD BE DENIED BY HIM BY THE STATE OF NEW JERSEY IF RELIEF IS NOT GRANTED.

The United States Supreme Court has recognized a citizen's constitutional right to procreate in the case of Skinner v. Oklahoma, 316 U.S. 534 (1942). Mr. Doe's rights under the Skinner ruling were violated by the state's action in prosecuting him. In Skinner, the court found the appellant's rights under the equal protection clause of the fourteenth amendment was violated when his fundamental procreation right was denied him. In that case, under the Oklahoma statutes, because he was found to be a habitual criminal, he would be rendered incapable of procreation. Distinguishing him as a member of one class who was deprived a

fundamental right, the court found a violation of Skinner's rights under the equal protection clause, citing Yick Wo v. Hopkins, 118 U.S. 356, 369. Skinner v. Oklahoma, supra at 541. In Skinner, the Supreme Court stated:

> "marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects."

This right of Mr. Doe is implicated when the state fails to recognize his right to protect his unborn child and his relationship with him or her. To say one has the right of procreation and the state cannot prevent him from having the capability to conceive, becomes meaningless if once conception takes place, all of a father's efforts to see that his child is born are frustrated by the mother with the assistance of the state. The state licenses and supervises a network of hospitals and abortion clinics designed for no other purpose then to terminate the life of the child. Under these circumstances the natural process of procreation and the father's attendant hopes and dreams of a child related to him being brought into the world for him to nurture and care for that are destroyed. His procreation is terminated.

This not inconsistent with the line of cases that suggests that the mother who carries the child, gives birth and has an existing relationship with the child, has greater rights than the father in a situation where the two never married. We have too much respect for the right of the mother under such circumstances to suggest that such law should be disrupted. See In the matter of Baby M, 109 N.J. 396 (1988). However, this is not a case in which the mother is competing with the natural father for the right to be the primary custodian of the child. It is not even a case where the mother is indifferent to her rights. It is a case where the mother's energies, money, and the power of the state are used to terminate the life of the child and thereby frustrate all rights of the father. Her maternal rights cannot outweigh the rights of the father because she specifically rejects them.

3. MR. DOE POSSESSES AN INDEPENDENT CONSTITUTIONAL RIGHT TO DISCHARGE HIS DUTY TO HIS CHILD (AND RIGHT TO PRACTICE HIS RELIGION).

When Mr. Doe seeks intervention through the courts to protect his rights and those of his child, among the rights he seeks to preserve was his right to discharge his obligations those grounded both in law and nature, to protect, care for, nurture, and educate

his offspring. See generally, Pierce v. Society of Sisters, 268 U.S. 510, 518. The father, aside from his own rights, would have a legal duty to care for the child and protect the child's life (see N.J.S.A. 9:17-40). In nature what higher law is there? This right is grounded in the obligation reflected in the paternity statutes, and is recognized under the due process clause of the Federal Constitution, and the Constitution of the State of New Jersey, article I, section I, (extending the right to defend life). New Jersey case law is in accord with the principles enunciated under this point. See D.Y.F.S. v. A.W. 103 N.J. 591 (1986).

Mr. Doe possesses substantial fundamental constitutional rights including the right to maintain a relationship with his child, the right to care and nurture his child, his fundamental right to procreate, his fundamental right to discharge his obligation to protect and care for the child, and his right to practice his religion. Individually any one of these rights was sufficient to permit Mr. Doe to intervene on behalf of his child. Collectively, they overcome any countervailing interest and the state cannot interfere with them. It is this group of rights which give rise to the Danforth dissenting opinion that a father has the standings and rights with respect to the unborn child, even when the unborn

child was not recognized legally as a person. Now that the courts have recognized the child's own rights, while still unborn (See Webster), the father's rights are even greater, and he has standing to exercise both the rights of his unborn child and those of his own.

POINT IV

FUNDAMENTAL RIGHTS OF MR. DOE AND THE SEPARATE RIGHTS OF HIS UNBORN CHILD, INDIVIDUALLY AND COLLECTIVELY FAR OUTWEIGH ANY PRIVACY INTEREST THAT THE MOTHER HAS WHICH LEGITIMATELY INVOLVES THE DECISION OF ABORTION.

The fundamental constitutional rights of Mr. Doe (discussed under Point III) and those of his unborn child (discussed under Points II and III), individually and collectively far outweigh the legitimate privacy rights of the child's mother as they involve the decision of abortion. The subsequent case law of abortion, in Webster, and of the rights of a father and his child under Quilloin and Santosky, following the court's decision in Planned Parenthood v. Danforth in 1976, all operate to strengthen the conclusion found in the dissent in the Danforth case in which Justices Rehnquist, White and Burger found that a father's interest in having a child and his continued companionship with the child, would outweigh the mother's privacy interest, relying upon Stanley v. Illinois. Planned Parenthood v. Danforth, supra, 428 U.S. at 93, 96 S.Ct. at 2852.

This conclusion is true whether a woman is viewed as having privacy rights that support the broad abortion rights inferred in Roe

or whether her rights, even in circumstances where there are no competing interests, are more restrictive as suggested under Point II A - 2 (b), of this brief.

If the mother's rights are viewed as more restrictive as we suggest under Point II of the brief, then there would be no competing interests with those of Mr. Doe and his unborn child because in this case there is no evidence that the mother's life was in danger (and the conception was as a result of consensual relationships between a man and his fiancee). Therefore, argument is advanced on the assumption that the mother's right is an expansive one under Roe.

A. BALANCING AGAINST THE CHILD'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO LIFE.

If the unborn child possesses his or her own fourteenth amendment right to life, then a woman's privacy interests concerning a pregnancy would be outweighed by the child's right to life.[14] When the interests of the child are weighed against a woman's desire not to be embarrassed or inconvenienced by

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[14] Even the Roe court acknowledged as much. 410 U.S. at 156, 157, 93 S.Ct. at 728. This statement assumes the mothers life is not in danger and does not address the balancing of interest present when conception is due to rape.

pregnancy and child birth, there is no doubt that the child's right would prevail. Embarrassment or inconvenience cannot be the basis for taking the life of another human being. The mother's interest in avoiding the natural consequences of pregnancy are reasonably satisfied by the state extending to her her Griswold rights. It may be said that where the father expresses an interest and willingness in caring for the child, then much of her concern is satisfied. Since the mother's privacy right to make a decision about abortion where her own life is in danger was not implicated in this particular case, we observe that the legitimate concerns about the danger to the mother's life set forth in Roe v. Wade would not be present. The child's interest and that of the State throughout pregnancy must prevail. C.f. Webster, supra. We examine the other harms listed by the Roe court: (1) maternity or additional offspring may force upon a woman a distressful life and future; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. As we pointed out under Point II, these are legitimate concerns that implicate the right of privacy. But they do not outweigh a state's compelling interest to protect the life of the unborn child, or the

right of the child him or herself. These are only reasons to have avoided pregnancy in the first place. It is a well established right of a woman and couples to prevent pregnancy and state action which would interfere with that right is unconstitutional. See Griswold, supra. The mother's fourteenth amendment Griswold rights are sufficient to satisfy these concerns. It would not be reasonable for a woman to expect that once she failed to exercise her fourteenth amendment Griswold rights, that her interest to avoid embarrassment and inconvenience would be sufficient to permit her to take the life of her own child, over the objection of the child's father and expect that others in society or the state would assist her in her endeavor. See California v. Greenwood, 108 S.Ct. 1625, 1628 (1988).

In addition, the disagreement of the father and the mother, and, the competing interest of the child whose rights are asserted, force the state to choose between life and its destruction. For the state to side with those who would discard human life when confronted with the substantial and asserted rights to preserve and protect it, the inherent nature of the state's power would require it to choose life over the destruction of it. See Berman v. Allan, supra, Gleitman v. Cosgrove, 49 N.J. 22 (1967).

In Gleitman v. Cosgrove, at 30, the New Jersey Supreme Court stated:

> "The right to life is inalienable in our society ... we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor ... (that) it may have been easier for the mother and less expensive for the father to terminate the life of their child while he was an embryo, but these alleged determinants cannot stand against the preciousness of the single human life... 49 N.J., at 30, 31 (emphasis added) (the holding in Gleitman was reversed by Berman when the Supreme Court of New Jersey thought that its law was superseded by the doctrine enunciated in Roe v. Wade).

Because of the Webster decision the application of the reasoning of the New Jersey Supreme Court in Gleitman again has application to the unborn child. The nature of the child's right as being unalienable, that the life of the human being has sanctity, and that it possesses a preciousness require us to preserve the life of the child when balanced against the interest of a mother who failed to exercise her Griswold rights. To do otherwise would violate the fundamental basis on which all society exists. See Berman v. Allan, supra.

A word on the alleged "harms" listed by the Roe court is necessary. It seems sinister for our country to adopt as official

policy that child rearing is an experience to be dreaded and feared to the point that we support a mother's termination of her child's life. There is another view that we think prevails: that we should not encourage a loathing for life but a love for it. It is a view that includes an appreciation for the happiness and fulfillment that children bring to what may be an emptiness of purpose for many.[15]

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[15] Studies have shown that most women who have contemplated before birth the surrender of a child for adoption change their mind after birth. This is one reason why the basic standard in adoption published by the Child Welfare League, states that "a relinquishment should not be taken until the child is born, and the mother has recovered from the effects of delivery", Sec. 2.22 Child Welfare League Standards for Adoption Services, 1978. The distress cited in the Roe court seems to be overcome when the love of the mother outdistances the fears of the unknown future. We are too respectful of the negative experience of the unwed mother not to be concerned for her situation. Society should support her in her time of need and all efforts should be made to help her keep her child if she chooses (even over the objections of the father; see Baby M, 109 N.J. at 462, 463).

The mother's Griswold rights are sufficient to protect her from the "harms". For those mothers who still feel they can not raise their child even after birth, they are free to choose to let the father raise the child or (after all support and help fails) surrender the child for adoption. No mother should be asked to carry a child just to surrender a baby, but adoption is available for those who choose it. The guilt associated with abortion for some women may carry greater stress then unwed motherhood. Griswold rights of a mother and her right to choose an adoption

B. THE RIGHTS OF MR. DOE TO THE CONTINUED COMPANIONSHIP WITH HIS CHILD, HIS RIGHT TO PROCREATE, HIS FUNDAMENTAL RIGHT TO DISCHARGE HIS OBLIGATIONS TO HIS CHILD, AS WELL AS THE CHILD'S RIGHT TO LIFE AND TO MAINTAIN ITS RELATIONSHIP WITH ITS FATHER OUTWEIGH THE INTEREST OF THE MOTHER'S PRIVACY RIGHT.

That a mother does not wish to exercise her rights only strengthens those of the father in Mr. Doe's position, and the father's relationship with the child, and the child's relationship with him. See discussion under Point III. Where, however, she does not simply exercise an indifference to her own rights, but seeks to destroy those of the child and father, her rights not only fail to outweigh theirs, but dissipate in the process (if she had them in the first place - see Point II A-2(b)). Where the mother refuses to exercise her privacy rights under Griswold, and the father and child seek to assert theirs, there is no interest that either the mother or the state would have that could interfere with their rights to life and liberty under the due process and equal protection clauses of the fourteenth amendment. The mother's failure to exercise her Griswold rights under the circumstances of this case are material

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make her privacy interest subordinate to those of the child (and where exercised, the father).

to the court's consideration and what weight should be given to her right. See Quilloin v. Walcott, 434 U.S. at 255, 98 S.Ct. at 555.

CONCLUSION

Recent developments and discoveries in science and medicine support the irrefutable conclusion that the life of a person begins at conception. The unborn child is a complete individual member of the human race throughout pregnancy.

The unborn child enjoys constitutional protection under the due process clause of the fourteenth amendment of the United States Constitution and under article I section I of the Constitution of the State of New Jersey. Pronouncements to the contrary found in Roe v. Wade have been totally undermined by subsequent decisions and events and is no longer viable law.

Mr. Doe, as the natural genetic father has the standing to raise the constitutional rights of his unborn child. He also possesses his own personal fundamental rights under the due process clause of the fourteenth amendment that require protection.

The substantial and fundamental rights of Mr. Doe and the separate rights of his unborn child, individually and collectively far outweigh any privacy interest that the mother has which legitimately involves the decision of abortion.

The prosecution of Mr. Doe was an unconstitutional intrusion upon the rights of his fundamental constitutional rights and those of his unborn child.

Respectfully submitted,

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J.M., individually and as guardian ad litem of his unborn unborn child Plaintiff,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. MON-C-66-92
vs.	:	CIVIL ACTION
V.C.; W.M.C.; et al	:	

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF J.M.'S MOTION FOR RECONSIDERATION TO VACATE THAT PORTION OF THE COURT'S MARCH 19, 1992 ORDER DISMISSING THE CLAIM OF J.M. INDIVIDUALLY

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POINT I

DEFENDANT V.C.'S RELIANCE UPON PLANNED PARENT-HOOD V. DANFORTH IS BASED UPON A MISCONSTRUC-TION OF THE DECISION AND A MISINTERPRETATION OF CURRENT LAW. THE ISSUE OF THE FATHER'S RIGHTS, AS PRESENTED IN THE CURRENT CASE, HAS NEVER BEFORE BEEN DECIDED BY THE UNITED STATES SUPREME COURT. THIS CASE PRESENTS ISSUES THAT WERE NOT PRESENT IN DANFORTH AND A MAJORITY OF DANFORTH RECOGNIZED THAT THE FATHER OF AN UNBORN CHILD POSSESSES CONSTITUTIONAL RIGHTS.

The case of J.M. v. V.C. involves questions of first impression not only in this jurisdiction, but issues never before decided by the United States Supreme Court. None of the cases cited by V.C. involve a father and therefore do not directly implicate his constitutional rights and his standing to assert the rights of his unborn child.

V.C. misinterprets the decision in Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976), and fails to address the changes in the current law that render the plurality holding in Danforth no longer the law of the land.

In his original brief, Plaintiff J.M. cites various constitutional rights that he asserts. See IPb62-14 to IPb71-12.[16] J.M. cited the dissent in Planned Parenthood of Central Missouri v. Danforth supporting one of the five constitutional rights on which he relies. In the dissent in the Danforth case, 420 U.S. 52 at 92, 93, 96 S.Ct. 2831 at 2851, 2852 (1976), Justices White, Rehnquist and Chief Justice Berger recognized the constitutional right of a father to the companionship of his child. That very same right was also recognized as having constitutional dimension by Justice Stewart and Justice Powell in a concurring opinion, Planned Parenthood of

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[16] Including the supplemental brief, the plaintiff has submitted four briefs in the case before the Chancery Division. For reference purposes we have numbered them by placing a roman numeral before the designation "Pb" so the references are as follows:

IPb refers to the plaintiffs brief submitted on March 9 in support of initial T.R.O. (consisting of seventy-eight (78) pages)

IIPb refers to plaintiffs reply brief dated March 19, 1992 (consisting of eleven (11) pages)

IIIPb refers to the Amended brief in support of plaintiff's motion for reconsideration dated April 10, 1992 (consisting of eighty-one (81) pages)

IVPb refers to this supplemental brief.

Central Missouri v. Danforth, 428 U.S. at 89-91, 96 S.Ct. at 2850, 2851. Both Justices Stewart and Powell cited with approval Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d. 551 (a father's right to companionship with his unborn child) and Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86, L.Ed. 1655 (the right to procreate).

In the plaintiff's original brief filed with the Chancery Division, the plaintiff failed to clarify two important aspects of Danforth: (a) that five justices recognized J.M.'s constitutional right to companionship (not three); and (b) that the right exists even before birth in the abortion context is established law. V.C. in this case ignores this aspect of the Danforth decision. It has application to the case at bar, particularly in view of the changes represented by Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989). Planned Parenthood of Central Missouri v. Danforth therefore is authority that a father indeed has a constitutional right to companionship with his child. (Justices Stewart and Powell in concurring opinion, and Justices White, Rehnquist and Berger in dissent). All five agree that the father has a constitutional right to continued companionship with his child, although the child has not yet been born.

The plurality decision, written by Justice Blackmun, has reasoning that is no longer applicable and no longer good law. Justice Blackmun's reasoned:

> "The State cannot 'delegate to a spouse veto power which the State itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy'. Clearly, since the State cannot regulate or prosecute abortion during the first stage when the physician and his patient makes that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion, during that same period."

Justice Blackmun's decision focused on the principal, (then accepted by a majority of the court) that a State does not have a compelling interest throughout pregnancy. Under the current law, that principal is no longer accepted by a majority of the court. See IIIPb36-19 to IIIPb39-15; IIPb1-1 to IIPb5-9.

The reasoning by Justice Blackmun in Danforth is inapplicable to the case at bar for other reasons as well. That case did not involve a husband who was asserting his own constitutional rights. The interest the state was seeking to advance was not one to preserve life or potential life. Rather it was the State's interest in preserving the "perception of marriage as an institution". The State's interest of that nature has never been found to be

"compelling". Here, however, the right of the father being asserted involves his right to preserve the life of his own child and under the current law (where five judges of the current court find that a State has a compelling interest throughout pregnancy) that is an interest that justifies denying an abortion to a woman.

More pertinent to the case at bar is a comparison of the analysis of Justice White's dissenting opinion with the concurring opinion of Justice Stewart. Even in the context where it is simply a State seeking to protect the perception of the integrity of a family, Justice Stewart correctly recognized that the father's rights were implicated. However, his analysis failed on the focus of his inquiry. He differed with the three dissenting justices on the basis that one of the parents should be given a veto over the question of whether an abortion should take place. The more correct focus was the question of whether one party has the power to veto the constitutional rights of another. Logically if the answer is that one parent can't veto the constitutional rights of another, then a mother can't veto the constitutional rights of a father. The inquiry or the question was whether it took two parents to agree that an abortion take place. In essence, the dissent is simply saying that before the life of a child can be destroyed, both parents must

agree on such a deleterious course for the child. If one parent or the other votes for the life of the child, then the second parent must comply with the wishes of the other. Otherwise, one parent could destroy the constitutional rights of another. The reason advanced for a mother's right to abort a child equally apply to the father, yet he can't destroy a mother's right to companionship with her child. See Point II below.

In addition, we only need look at the logic for the justification for the mother being able to the destroy the rights of the father. Just as it does not follow that the courts must conclude that one parent's vote is sufficient to take the life of a child, the reason that the power is given to the mother does not relate to questions pertaining to what is in the best interests of the child, or justify a mother taking the life of her child. That the mother carries the child physically draws a factual distinction between the role of the father, there is no doubt. But that fact is reflected in the law of the State of New Jersey on the question of custody. Our law requires that preliminary questions of custody in situations where a child is born out of wedlock, requires that the baby stay with the mother absent a showing of unfitness or the like. See In the Matter of Baby M, 109 N.J. 396, 462, 463 (1988). The fact that

the mother carried the child does not bear upon rights to terminate the life of the child. Rather, it bears upon questions relating to what is in the mother's interest and the interest of the child following birth. That is because the carrying of the child directly relates to bonding, which affects the health of both the child and the mother. The fact that the mother carries the child is certainly not an unimportant consideration and is one concerning which we have deep respect. However, the mother's cherished role in the life of the child bears no relationship whatsoever on the question of the child's death, but rather relates to circumstances where the child will be born. The New Jersey policy which extends the rights to equal custody and say in the rearing of the child (subject to fact intensive analysis on what is best) is grounded in New Jersey Paternity Statues. N.J.S.A. 9:17-38, et seq.

Not only does the reasoning of Justice Stewart not support their conclusions at the time they rendered the decision in 1976, they no longer have application because of the current changes in the law. As we have seen, the State is now recognized as having a compelling interest in preserving the life of the unborn child. That was not the case when Justice Stewart wrote his concurring opinion. That being the current law, a father's interest can be no

less than that of the State. See IPb50-1 to IPb52-16. In other words, if the State can stop destruction of a father's rights, so can a father.[17] But equally important is the fact that there is a new balancing and weighing of the interests involved. In the appellant's brief, we cited four constitutional rights that J.M. possessed individually: the right to companionship (recognized by five judges); the right to procreate; the right to defend life; and the right to discharge his obligation to his child. In addition, we point out the fifth constitutional right of J.M. that would be denied him if the abortion decision were a mothers' only - the right to the equal protection of the law. That one parent would be given the absolute power to determine whether a child shall live or not, and that right would be denied another class of parents, would be a violation of equal protection as set forth under Point II of this brief.

At the time that Justice Stewart and Powell concurred in the Danforth decision, the Supreme Court of the United States ruled

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[17] We do not suggest that the child does not have his or her own individual rights as set forth in Appellant's main brief. However, for the sake of argument and in dealing with the father's rights only, we needn't reach the conclusion that the child has his individual rights to recognize the fact that the father had the right to block the abortion.

that the constitutional right of a mother which involved a decision concerning abortion was a fundamental right. That is no longer the law of the land. Roe v. Wade, referred to the abortion right as a fundamental one. In the recent United States Supreme Court case of Hodgson v. Minnesota, 110 S.Ct. 2927 (1990) and Ohio v. Akron Center for Reproductive Health, 110 S.Ct. 2972 (1990), the majority of the Supreme Court of the United States declined to refer to the mother's abortion right as "fundamental", but considers it a liberty interest only. Because five justices of the current court no longer accept the nature of the right as being fundamental, that portion of Roe v. Wade, which deemed the abortion right a "fundamental right" is no longer the law of the land. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 940 F.2d at 690 to 694 (3rd Cir. 1991). If the mother of J.M.'s child did not possess the fundamental right, whereas he possessed five separate constitutional rights, all of which are deemed fundamental, then the State of New Jersey would be required to preserve the rights of a father when he asserts them. This does not mean that the child does not have his or her own constitutional rights, independent of the father. Nor does it mean that J.M. did not have the constitutional right to assert the rights

of his child. We simply distinguish his rights from that of a child and point out the power and force of his bundle of rights when weighed against whatever interest a mother has in terminating the life of her own child.

POINT II

EXTENDING AN EXCLUSIVE DECISION MAKING POWER CONCERNING THE LIFE OF THE UNBORN CHILD TO A MOTHER IS A DENIAL OF J.M.'S OWN CONSTITUTIONAL RIGHTS AND A DENIAL TO HIM OF THE EQUAL PROTECTION OF THE LAWS

In this case, J.M. raised four constitutional rights personal to himself: his fundamental right to companionship with his child, his fundamental right to procreate, his fundamental right to discharge his obligation to his child, and his federal due process right and New Jersey Article I right to protect the life of his child.[18] See IIIPb52-1 to IIIPb69-8. In his Amended brief J.M. also raised his constitutional right to the equal protection of the laws. We here

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[18] V.C. misses the point on the defendant's right to defend life. She argues that a State constitutional right can't supersede that of the Federal Constitution if the State right were to frustrate rights guaranteed under the Federal Constitution. That goes without saying. But where the United States Supreme Court, through the opinion of five of its justices, observe that a state has a compelling interest in preserving the life of the unborn child throughout pregnancy (see, Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d at 690 to 694 (3rd Cir. 1991) (holding that if five justices of the Supreme Court disagree with a previously pronounced principle of law, the old principle is no longer the law of the land)), the State's constitutional right extended to the defendant to protect life would advance an interest that is considered compelling and the father, in exerting his own rights, could stop an abortion.

further define it. If defendant's interpretation of Planned Parenthood v. Danforth, 420 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d. 788 (1976) were to be adopted by this court, then the State would violate an additional constitutional right of J.M. - that of the equal protection of the laws.

J.M. IS ENTITLED TO EQUAL PROTECTION OF THE LAWS

A dispute such as the one before the court, where a natural father seeks to preserve the life of the child and the child's mother seeks an abortion, has never been decided by either our courts in New Jersey or those of the Federal Court system. If New Jersey were to extend to the mother the exclusive decision making power over the question of what is in the best interests of the unborn child, and reposit in her the exclusive decision making power over whether a child shall live, the extension of such a right to the mother is a denial of the equal protection of the father. Cf. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). The New Jersey Supreme Court has clearly and accurately stated equal protection concepts in the three different types of scrutiny to which state action is subjected. In U.S.A. Chamber of Commerce v. State, 889 N.J. 131 at 157, 158 (1982):

"When (state action) regulates 'fundamental rights' or 'suspect classes' it will be subject to 'strict scrutiny' and the state will be required to demonstrate (1) that a compelling need justifies the legislation and (2) that no less restrictive alternative will accomplish that state objective. See Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). At the other end of the spectrum is the rational basis test. Under this standard of review, a court inquires whether there is a conceivable, legitimate state objective and second whether the classification selected is rationally related to that objective. Id. at 371-72, 91 S.Ct. at 1851-52, 29 L.Ed.2d. at 541; Dandridge v. Williams, supra, 397 U.S. at 486-87, 90 S.Ct. at 1162, 25 L.Ed.2d. at 502-503. In considering the second, the categories need not be formed with mathematical nicety and legislatures may attack a problem one step at a time. Williamson v. Lee Optical, supra, 340 U.S. at 488-89, 75 S.Ct. at 464-65, 99 L.Ed. at 572-573 (1955).

The third approach, articulated by the Supreme Court in Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d. 397 (1976), is an intermediate one. The appropriateness of intermediate scrutiny depends upon the character of the legislative classification or the nature of the rights affected by the statutory scheme. It may be that a 'semi-suspect' classification, like gender, is implicated or that a fundamental right is being substantially affected in an indirect manner. E.g., Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100 (1972). In these circumstances the legislative classification must serve important governmental objectives and must be substantially related to achievement of those objectives."

1. THE CLASSIFICATION DRAWN BY NEW JERSEY EXTENDING RIGHTS TO MOTHERS AND DENYING THEM TO FATHERS, MUST BE STRICTLY SCRUTINIZED AND WOULD REQUIRE A COMPELLING INTEREST FOR ITS JUSTIFICATION, BECAUSE IT DENIES THE FATHER ONE OR MORE FUNDAMENTAL RIGHTS.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment of the United States Constitution may rise under the case law or common law of the State as well as under its legislative enactments. Jersey Shore Medical Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143, 144, 145 (1980).

The New Jersey Supreme Court, in Jersey Shore has stated:

> "The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' Shelly

> v. Kraemer, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment." Jersey Shore v. Estate of Baum, 84 N.J. at 144, 145.

The classification created by New Jersey Law, if it were to exclude fathers from the decision making process and give that decision making ability only to mothers, would require, for its justification, a compelling state interest, because it would deny J.M. his fundamental constitutional rights: (1) of Companionship with his child; (2) to procreate; (3) to discharge his duty to his child; and (4) to defend the life of his child. Shapiro v. Thompson, 394 U.S. 618, 638 (1969); Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533, 561-562 (1964); Kraemer v. Union Free School District, 395 U.S. 621, 626-628 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Cf. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See IIIPb52-3 to IIIPb-65-25.

New Jersey has recognized parental rights, generally, as implicating constitutional rights under our own constitution. See D.Y.F.S. v. A.W., 103 N.J. 591 (1986). The Supreme Court of New Jersey has recognized that a father not married to a woman

who carries his child, even where conception is the result of artificial insemination, enjoys an equal right to custody under the paternity statutes of the State of New Jersey. See In the Matter of Baby M, 109 N.J. 396 (1988). It is rather clear that if a court finds that any fundamental right of J.M. exists, a classification which extended decision making to one parent based upon gender and denied it to the other would be a deprivation of J.M.'s right to equal protection of the laws because it would deny him one or more of his fundamental constitutional rights. That result would be required by a balancing of the harms to the father and mother. The objective in giving the mother a way to avoid the stress of child rearing can be achieved in a way that doesn't deprive the father of his rights: she need not participate in the child rearing if that is her choice. The state's interest in helping her avoid the stigma of unwed motherhood is satisfied in the same way. The state's interest in helping her avoid the stigma of pregnancy out of wedlock cannot be said to be compelling (and therefore justify denying the father his fundamental rights) where the mother did not take all necessary steps to avoid the pregnancy herself.

2. THE COURT NEEDN'T FIND THAT THERE BE A DEPRIVATION OF FUNDAMENTAL

CONSTITUTIONAL RIGHTS OF J.M. FOR THE COURT TO FIND THAT THERE IS A DENIAL OF EQUAL PROTECTION OF THE LAWS. THE GENDER BASED CLASSIFICATION REQUIRES INTERMEDIATE SCRUTINY AT THE VERY LEAST.

Because the classification created by the State action would be gender based an intermediate scrutiny would be applied to the New Jersey classification and would be unconstitutional even if a fundamental right wasn't involved.

The court needn't conclude that J.M. has a fundamental right in order to find that there is an equal protection violation (although it is clear that he does have such fundamental rights). Even if the rights that he asserts could be classified only as liberty interests there would have to be a valid interest of the State that relates to the purpose of the distinction in giving the power of life and death of one parent and not to the other. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976). Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977); Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 300 (1977).

Where the mother's life is not at stake and she was not denied her voluntary powers at the time of conception (such as in the case of rape or its equivalent) there is no valid distinction between

a father's place in making decisions on the life of his child and that of a mother. The reasons advanced by the U.S. Supreme Court to support the mother's justification for an abortion apply equally to a father (the stress in rearing a child and stigma associated with unwed parents). We recognize that there is a factual difference in the contributions that a mother makes in carrying a child which is not made by the father. However, that distinction is properly recognized in the law which extends to the mother the right to choose to be the primary custodian when the parents do not live together at the time of birth. This distinction is already reflected in our case law. In the Matter of Baby M, 109 N.J. 396, 462, 463 (1968). The fact that the mother carried the child does not bear upon the right to terminate the life of the child. Rather, it bears upon questions relating to what is in the mother's interest and in the interest of the child following birth. That is because the caring of the child directly relates to bonding, which affects the health of both the child and the mother. This is not an unimportant consideration and is one concerning which we have deep respect. However, it bears no relationship to the question of whether a mother or father should be included in the decision making process concerning the best interest of a child where the sole question

presented is whether the child should live or die. Young children are always dependent upon adults to survive. That an unborn child relies upon its mother for nourishment is not unique. Indeed, that fact creates obligations to the child, not exonerations. Even doctors, unrelated to a child, have legal obligations not to harm a child which is in a mother's womb. Smith v. Brennan, 31 N.J. 353 (1960). The New Jersey policy extends the right to equal custody and say in the rearing of a child (subject to fact intensive analysis of what is best for the child) and is grounded in New Jersey paternity statutes, N.J.S.A. 9:17-38 et seq.

Under the New Jersey parentage act, the obligations of J.M. are derived from the fact of conception alone. This logically flows because he has no power or control over the course of the pregnancy. Therefore, his obligations are really derived from the fact of the conception itself, and the birth of the child is a natural consequence of it. His duty to be a father under the law, which includes support, is derived from the single act of conception. He has no right to demand an abortion, nor should he. His embarrassment or hardship, or distress that flows from an unplanned pregnancy, whether he is prepared to rear the child or

support the child, is irrelevant to the question of whether society should extend him the right to destroy the child's life.

However, where the choice he seeks to enforce is one consistent with the child's best interest, the same statute that imposes obligations upon him based upon the single act of conception, extends to him the right to affirmatively choose to live up to his obligations and help raise the child through custody and visitation.

Likewise, under the adoption statutes, a judgment of adoption cannot be entered against the natural father over his objection, expressed to a court, unless there is a specific finding that he has abandoned the child or is guilty of neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother, under the New Jersey Statutory scheme, is based solely upon his status as genetic father. That right to block an adoption is based upon the act of conception only. See, In re Adoption of a Child by J.R.D., 246 N.J. Super. 619 (Ch. Div. 1990).

The issue can be framed in different ways. The state may choose to frame the issue as the father blocking the mother's right to take the life of her own child. But probably more to the point and of greater clarity is that what V.C. proposes is that the

father's enjoyment of the benefits of his relationship with his child, his fundamental constitutional rights, can be arbitrarily entrusted to another who could destroy the relationship that he has with his child upon whim, fancy, unfounded facts and assumptions and may very well constitute a decision which would later be regretted even by the mother who made it.

If the fundamental constitutional right of the father is implicated, then the classification created by New Jersey law that would extend exclusive decision making power to the mother is a violation of due process because there would be no compelling interest of the State. If the constitutional rights were not deemed fundamental, the classification created by New Jersey statutes is gender based, requiring intermediate scrutiny. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d. 397 (1976). As a result, the State classification must serve important governmental objectives and must be substantially related to the achievement of the objectives. The objective here is to protect the right of the mother to participate in making decisions about whether she shall become pregnant. See Roe v. Wade, 410 U.S. Ct. 153; 93 S.Ct. at 727. That objective really is a joint one which involves both parents. To say only fathers or only mothers can demand an abortion is not a

classification which truly relates to the objective in question. For another the Griswold rights adequately satisfy this interest. When a father asserts what is in the interest of his child, what is in the interest of the family prevents the decision making power from residing exclusively in one parent or the other.

Where one parent or the other is willing to raise the child or take responsibility for the child, the inconvenience of raising the child is not a consideration. Questions pertaining specifically to gender certainly don't relate to the question. With respect to the inconvenience of carrying the child, which is one that is unique to the mother, these considerations are not implicated. Those considerations are relevant only prior to conception concerning the decision of whether a woman should become pregnant or not. Once she is pregnant, and a father has constitutional rights, and another human being is in existence, a State has a legitimate compelling interest in protecting the life of the child if requested. The inconvenience of the mother in carrying the child is never really a consideration. That is reflected in the fact that even under Roe v. Wade the State has a compelling interest in protecting the life of a child in the third trimester when pregnancy is most inconvenient to a mother and when she is subjected to the

greatest pain and discomfort at the time of childbirth. Therefore, gender is not a legitimate distinction that specifically relates to the State's objectives concerning the question of whether a child should live or not. The parental rights of J.M. extended to him under New Jersey law and the Federal Constitution are always based upon what is in the child's best interest. Fantony v. Fantony, 21 N.J. 525, 536 (1956). This is even true in a situation where conception of a child is the result of artificial insemination under a contract that is unenforceable and void ab initio as contrary to the public policies of the State of New Jersey. In the Matter of Baby M, 109 N.J. 396 (1988). In actuality, when one parent chooses to preserve the life of the child, he is exercising his parental right to do what is in the child's best interest. To extend total power to one parent, such to destroy those constitutional rights based solely upon the sex of the parent, bears no relationship to the state's objective to allow couples to avoid pregnancy.

Finally we note that it is not clear why the New Jersey Supreme Court dismissed the infant's claim in the case of J.M. v. V.C., M-970, March 1992. However, it is incumbent upon this court to make findings on the question of whether an unborn child

is a human being. To that end, we note that the New Jersey Supreme Court in applying New Jersey Law has stated:

> "It is clear that medical authority has recognized that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." Smith v. Brennan, 31 N.J. at 364.

The Supreme Court has also stated that:

> "Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body." Id. 31 N.J. at 362.

A finding of fact is appropriate and relevant to the separateness of the unborn child as a complete human being. Even our own Supreme Court has said as much as early as 1960. A clear record should be provided so this finding may be used in reaching legal conclusions concerning the father's rights.

POINT III

BECAUSE A STATE HAS A COMPELLING INTEREST IN PROTECTING THE LIFE OF AN UNBORN CHILD THROUGHOUT PREGNANCY, NEW JERSEY HAS THE POWER TO RULE IN FAVOR OF J.M. WHO SEEKS PROTECTION FOR THE LIFE OF HIS CHILD, WITHOUT THE COMPULSION OF THE ORIGINAL DECISION OF ROE V. WADE. NEW JERSEY LAW CLEARLY PROVIDES FOR THE BEST INTEREST OF THE CHILD AND SUPPORTS THE FATHER WHO SEEKS TO PRESERVE THE LIFE OF HIS CHILD.

J.M., in his amended brief, advanced five constitutional rights implicated by this case. Arguments pertaining to two of those rights (companionship with his child, and equal protection) have been supplemented in this brief. In addition to those five constitutional arguments, J.M. advanced argument on New Jersey's law which would protect the right of the father to do what was in the best interest of his child (See Amended Brief Point IIIB(6)). This point supplements that argument.

As we have clearly expressed, under current law, the State of New Jersey is free to protect the life of the unborn child if it chooses to exercise its power. (See IIIPb36-19 to IIIPb39-15; IIPb1-1 to IIPb5-9). Whether the State chooses to exercise its power through criminal statutes or not, is irrelevant to the question of whether the State will or must exercise that permissible power

in the context of the case such as that before the court. Here, a natural parent of the child (and the mother's opposition) compels the State to rule one way or the other. New Jersey, under its current law, and with the restraints of Roe v. Wade now lifted, clearly supports a father's effort to do what is in the best interests of his child and preserve the child's life, over the objection of the parent who seeks to destroy that life.

Some preliminary observations should be made before further elaboration of New Jersey law that would control this dispute. Firstly, the New Jersey Supreme Court has not ruled on the New Jersey Law in the matter of J.M. v. V.C.. Obviously, if the New Jersey Supreme Court intended to establish a legal right on the part of the mother over the objection of the father based upon State law, the court, would say so expressly. Their failure to speak in the matter of J.M. v. V.C., together with the court's reference to "current law" in its order on Motion 970, leads to the inescapable conclusion that the Supreme Court of New Jersey erroneously believed that Roe v. Wade still acted as a bar to a State protecting the life of an unborn child.

Secondly, since the New Jersey Supreme Court's Order dated March 24, 1992, oral argument was held in the United States

Supreme Court in the Matter of Planned Parenthood of Southeastern Pennsylvania v. Casey. A copy of portion of that transcript is attached hereto for the court's reference.[19] In exchanges between Justices on the bench and members of the bar, Justice Scalia clearly corroborated the position of plaintiff in this case. In this case, the plaintiff has continuously (twice making argument to the New Jersey Supreme Court) that New Jersey is free to assert its own position on whether the father has rights, whether New Jersey would side with the father, or whether the unborn child is a person under New Jersey law who has her own rights. On April 22, 1992, Justice Scalia stated from the bench:

> "We did not say in Roe that a State could not have a position on whether a fetus is a person, did we?...We said that the Constitution takes no position on whether a fetus is a person, and/or that it does take a position that a fetus is not protected by the constitution...including State regulation on the basis of the people's determination within that State that a fetus is a person. There is nothing in Roe that says that a State may not make that judgment if it wishes." See Transcript attached.

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[19] The transcript portion is taken from a reprint by the New York Times. An official copy of the Supreme Court transcript has been ordered by the plaintiff but has not been received as of the time of the dictation of this brief.

It is the intention of J.M. to file a petition with the United States Supreme Court in the next couple of weeks asking that the court review the rights of the child. But Justice Scalia's clarification of the current law, which corroborates the position that the plaintiff has taken throughout this case, has application to J.M.'s individual rights. Much of the rights of J.M. depend upon the nature of the life of the child. In addition, as is set forth in the last portion of this point heading, part of J.M.'s individual rights is his own standing to raise and protect the rights of his child. The existence of the child and whether the child has rights under the Federal Constitution as well as under the State constitution can be raised by J.M. We raise them on this motion and in the context of J.M.'s individual claim not only to preserve our record for future appeal, but because they have application even on the trial level in ruling on J.M.'s individual rights, his individual right to raise his child's rights, and whether his child has any rights. All of these issues he is entitled to litigate himself and any rulings made adverse to the child are not res adjudicata against himself. We agree with Judge Shebell in his dissent that to some extent, law is laws in a State of flux; but only to the extent of the federal question concerning the individual rights of the unborn child. We

believe a correct interpretation of the current law, requires the conclusion that the Fourteenth Amendment protects the unborn child. However, there is clearly no state of flux with respect to the rights of J.M. individually, under Federal law, or under State law.

A. NEW JERSEY LAW AND POLICY REQUIRES THE PROTECTION OF THE LIFE OF THE UNBORN CHILD AT THE REQUEST OF A NATURAL PARENT.

New Jersey law provides protection of the life of the unborn child. There are essentially five areas of policy and policy concern, under New Jersey law, which requires the protection of the life of the unborn child.

1. NEW JERSEY RECOGNIZES AN UNBORN CHILD AS AN INDIVIDUAL TO WHOM OTHERS OWE A DUTY, WHICH THE STATE WILL COMPEL PEOPLE TO DISCHARGE.

New Jersey recognizes that an unborn child is an individual and separate human being from its mother while still in the mother's womb. Smith v. Brennan, 31 N.J. 353, 362, 363 (1960). In Smith v. Brennan, the New Jersey Supreme Court stated:

> "They have found that the existence of an infant separate from its mother begins before birth, (citations omitted). Medical authorities have long

recognized that a child is in existence from the moment of conception and not really a part of its mother's body (citations omitted)."

In Smith the Supreme Court cited with approval the following language from the dissent of Justice Brogan in the case of Stemmer v. Kline:

"'While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart of the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother, but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.' 128 N.J.L. at page 466."

The Supreme Court, in ruling for the first time in the jurisdiction of New Jersey that physicians owe a duty to the unborn child and can be held liable when the duty to the unborn child is breached, stated:

"From the foregoing it is clear that medical authorities recognized that before birth an infant

> is a distinct entity, and that the law recognizes that rights that he will enjoy when born can be violated before his birth."

One of these rights is the right to life itself. Art. I, Sec. I.

In Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 423 (1964), the New Jersey Supreme Court found that the State had an interest in protecting the life of an unborn child. The court found that the right was personalized to the life of the unborn child and appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in its mother's womb even over the objection of the baby's mother. The duty the parents owed to the child was recognized in the law and could not be subjugated to the religious beliefs of the parents.

In the absence of Roe v. Wade the New Jersey Supreme Court has declared that abortion is against the public policy of the State of New Jersey, and that New Jersey has an interest in protecting the life of the unborn child. Raleigh Fitkin v. Anderson, supra; Gleitman v. Cosgrove, 49 N.J. 22 (1967); Berman v. Allen, 80 N.J. 421, 429 (1979).

The public policy expressed in both Gleitman and Berman emphasized New Jersey's commitment to life and its protection

especially in the context of the unborn child. See the discussion at IIIPb40-1 to IIIPb41-17.

The right of a woman to abort a child referred to in the New Jersey Supreme Court case of Right to Choose v. Byrne, 91 N.J. 287 (1982) is not contrary to the cases cited here. Byrne was referring to the Federal Constitutional right annunciated in Roe v. Wade. It did not establish a constitutional right under New Jersey law, nor could it. That right is contrary to New Jersey law. Byrne is no longer viable law in view of the changes found in Webster and subsequent cases cited above.

2. ABORTION OF A CHILD VIOLATES NEW JERSEY'S PUBLIC POLICY THAT ARISES FROM THE GOVERNMENT'S DUTY TO PROTECT THE SAFETY, HEALTH, MORAL AND GENERAL WELFARE OF ITS CITIZENS.

Our State government was "instituted for the protection, security and benefit of the people." N.J. Const. (1947), Art. I, Sec. 2. It has an inherent duty to protect the safety, health, moral and general welfare of the people. Indeed this duty is at the heart of why governments are formed. This duty extends to the protection of all citizens and it is the essence of the police power of the State. See 16 C.J.S. Constitutional Law, Sec. 432 at 389

(1984). The Judiciary in New Jersey has recognized that it has an independent obligation in regard to this duty. The prevailing concepts as to how the government should go about performing this duty define important public policies. See Allen, 131 N.J. Law at 478. It is well established the State has an interest in protecting the welfare of children within its borders and in the exercise of its parens patriae powers, has a duty to see that every child receives proper care and treatment. 43 C.J.S. Infants, Sec. 5 at 67 (1978); See D.Y.F.S. v. A.W., 103 N.J. 591 (1986); See Johnson v. State, 18 N.J. 422, 430 (1955), cert. den. 355 U.S. 942, 76 S.Ct. 318, 100 L.Ed. 822 (1956).

The affidavits submitted to the court demonstrates that an abortion is a painful and brutal death of a defenseless member of the human race. To the extent that a trial in this case would establish that many of the unborn children who are subjected to abortions, are subjected to unbearable pain, it is clear that not only the death itself, but the method of death is against the policy of the State.

No civilized State or Nation could seriously contend that it is not in its interest to prevent the death of human beings in this fashion. In discharging the State's obligation to protect the health

and welfare of children, it is incumbent upon this State to rule in favor of a father who seeks to protect the child from such a fate.

3. PERMITTING AN ABORTION OVER THE OBJECTIONS OF THE FATHER IS CONTRARY TO THE POLICY OF THE STATE OF NEW JERSEY WHICH BASES ITS DECISIONS CONCERNING THE CHILD'S WELFARE UPON THE BEST INTERESTS OF THE CHILD.

It is undisputed that the policy of the State of New Jersey that the rights of parents with respect to their children are always based upon what is in the child's best interest. Fantony v. Fantony, 21 N.J. 525, 536 (1956); In the Matter of Baby M, 109 N.J. 396 (1988). When a father seeks to assert his own rights, and a mother seeks to assert what she perceives to be hers, the deciding factor, when the life of a child is held in the balance, is what is in the best interest of the child. Harming any child over the objections of the natural parent is against the policy of the State and requires the court to rule in favor of the father's assertion of his rights in this case.

4. AN ABORTION IS CONTRARY TO THE POLICY OF THE STATE OF NEW JERSEY THAT WE DON'T TERMINATE PARENTAL RIGHTS UNLESS THERE IS A SHOWING OF ABANDONMENT OR NEGLECT.

It is the policy of the State of New Jersey that the parental rights of a parent is not terminated unless there is a showing of abandonment or neglect. D.Y.F.S. v. A.W., 103 N.J. 591 (1986); Sees v. Barber, 74 N.J. 201 (1977); In the Matter of Baby M, 109 N.J. 396 (1988).

When one parent, who has neither abandoned nor neglected his child seeks to preserve the possibility that he have custody of the child, the State must preserve the life of the child over the objections of the mother. The father in this case has acted admirably for one under the circumstances. He seeks what is only best for his child and a ruling in favor of the parent is worse than termination of his parental rights: it is actually the State's involvement in the taking of the life itself of the child. Such an act on the part of the State is contrary to this State's policy and law.

In the Matter of Baby M, supra, a father sought to terminate the parental rights of a mother based upon a private contract. The father maintained that the State of New Jersey had no power to interfere with the wishes of a couple found in the contract (even though the mother later objected). The New Jersey Supreme Court found the contract unenforceable and void ab initio. Here a mother states that she may more than unilaterally terminate the

rights of the father without his agreement - she asserts a right to terminate the life of the child him or herself. Such an act is contrary to our policy and therefore the father's rights can be preserved through injunctive relief.

5. GRANTING THE MOTHER AN ABORTION IS AGAINST NEW JERSEY'S POLICY, WHICH EXTENDS THE RIGHT TO PARENTS TO PROTECT THE LIFE OF THEIR CHILDREN.

As we have seen it is the policy of the State of New Jersey to protect life. Berman v. Allen, supra; New Jersey Constitution, Art. I, Sec. 1. It being a policy of this State to permit its citizens to protect life, especially parents to protect the life of their own children, granting an abortion to the defendant would be a violation of that law and policy.

B. PART OF J.M.'S CONSTITUTIONAL RIGHTS IS HIS RIGHT TO RAISE SUBSTANTIVE CLAIM OF HIS OWN CHILD. HE HAS "STANDING" TO LITIGATE HIS CHILD'S SUBSTANTIVE RIGHTS AS PART OF HIS OWN CLAIM.

Part of J.M.'s own constitutional rights is that he has the standing to raise the rights of his child. All of the constitutional rights set forth in the briefs before the court filed by J.M. must by necessity include this additional right. Because he is a separate person and a separate litigant from the unborn child, he also has

the right to litigate the very question of whether the child has his or her own constitutional rights. This necessarily flows from the question of his standing to raise the child's rights. If the child has no rights then he would have no standing. To preserve the record on further review he asserts both his right to have standing as well as his child's rights. In view of the comments of Justice Scalia, on April 22, 1992, as set forth above, he is entitled to make a proper record on the child's own rights under New Jersey law (and Federal Law) as a necessary and integral part of the legal question of whether he has the standing to raise his child's rights.

CONCLUSION

Defendant V.C.'S reliance upon Planned Parenthood v. Danforth is based upon a misconstruc-tion of the decision and a misinterpretation of current law. The issue of the father's rights, as presented in the current case, has never before been decided by the united states supreme court. This case presents issues that were not present in danforth and a majority of danforth recognized that the father of an unborn child possesses constitutional rights.

Extending an exclusive decision making power concerning the life of the unborn child to a mother is a denial of J.M.'S own constitutional rights and a denial to him of the equal protection of the laws.

Because a state has a compelling interest in protecting the life of an unborn child throughout pregnancy, new jersey has the power to rule in favor of J.M. Who seeks protection for the life of his child. Without the compulsion of the original decision of Roe v. Wade, New Jersey law clearly provides for the best interest of the child and supports the father who seeks to preserve the life of his child.

Respectfully submitted,

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Dated: April 28, 1992

(1) (4)

Nos. 91-2034 and 91-2040

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J.M., Individually,

Petitioner,

—v.—

V.C.,

Respondent.

J.M., Guardian Ad Litem,

Petitioner,

—v.—

V.C.,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent V.C. submits this brief in opposition to the petitions for a writ of certiorari filed by petitioner J.M., on behalf of himself individually and as guardian *ad litem* for the interests of a fetus. Both petitions seek review of the judgment of the New Jersey Supreme Court below.[1]

COUNTERSTATEMENT OF JURISDICTION

For three reasons, this Court does not possess jurisdiction to review the judgment of the New Jersey Supreme Court. First, there is no jurisdiction to review petitioner's claims as an individual, because those claims are still pending in the Appellate Division of the New Jersey Superior Court, in an appeal as of right that petitioner took from the trial court's decision to dismiss that portion of the complaint. Consequently, there is no "final judgment" by "the highest court of a State in which a decision could be had," and therefore no jurisdiction under 28 U.S.C. § 1257. Second, petitioner lacks standing to assert the interests of the fetus, because a fetus is not a "person" with independent legal rights under the law. Finally, petitioner's assertion that this case implicates his constitutional rights is frivolous, because the rights he asserts protect a person only against *governmental* action, and there is no governmental interference with petitioner's rights in this case. Consequently, no jurisdiction lies to hear the utterly meritless federal questions raised by the petitions.

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[1]Specifically, both petitions seek review of the orders of the New Jersey Supreme Court dated March 24, 1992. Given that petitioner seeks review of judgments entered on the same day, by the same court, in the same action, involving the same parties, respondent is at a loss to understand why petitioner filed two separate, but nearly verbatim petitions. In the interests of judicial economy, this brief is filed in opposition to both petitions.

A. There Is No Final Judgment Regarding Petitioner's Claims As An Individual.

Petitioner initiated this case in the State trial court with a complaint seeking an injunction prohibiting respondent from obtaining an abortion. Petitioner brought the complaint on behalf of himself and as guardian *ad litem* for the fetus. The trial court dismissed the complaint insofar as it was brought on behalf of petitioner individually, but declined to dismiss the complaint brought on behalf of the fetus, and on that basis temporarily enjoined respondent from having an abortion. Both parties sought emergent leave to appeal from the State appellate courts. The New Jersey Supreme Court ultimately granted respondent leave to appeal, summarily reversed and vacated the temporary restraints and summarily dismissed the complaint brought on behalf of fetus. The appellate courts, however, denied petitioner leave to appeal the dismissal of the complaint brought on behalf of himself individually, so that portion of the trial court's decision was never heard by the appellate courts.

Following the New Jersey Supreme Court's order denying him leave to appeal, petitioner returned to the trial court and moved for reconsideration of the order dismissing the complaint brought on behalf of petitioner individually. When the motion for reconsideration was denied, petitioner filed a notice of appeal of the trial court's dismissal of his individual claim. This appeal was as of right and timely filed, and it is still pending in the Appellate Division of the New Jersey Superior Court.[2]

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[2]Petitioner's appeal to the Appellate Division is as of right pursuant to N.J. Ct. R. 2:2-3(a)(1). Although the notice of appeal was filed more than 45 days after the order dismissing the complaint brought by petitioner individually, *see* N.J. Ct. R. 2:4-1 (a), the time for filing was

Under 28 U.S.C. § 1257, Supreme Court review of State court decisions is available only with respect to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This "final judgment rule" is the first requirement for jurisdiction under Section 1257. Generally, to be reviewable the State court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945).

The finality rule "serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973).

Although a State trial court order may qualify for review under Section 1257, this is true only if the order cannot be reviewed by *any* State appellate court. *See Grovey v. Townsend*, 295 U.S. 45, 47 (1935). But where there is an appeal as of right in a higher court, or even if discretionary review is available, such review must be sought. *See Benton v. Maryland*, 395 U.S. 784, 786 (1969); *Tumey v. Ohio*, 273 U.S. 510, 515 (1927).

In this case, petitioner has properly taken an appeal as of right from the trial court's decision to dismiss his

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properly tolled by petitioner's motion for reconsideration. *See* N.J. Ct. R 2:4-3 (e); N.J. Ct. R. 4:49-2.

individual complaint, and that appeal is still pending in the New Jersey Superior Court, Appellate Division. The appeal raises all the same federal constitutional issues petitioner seeks to raise before this Court. This pending appeal in the New Jersey State court system bars review of petitioner's claim in this Court.

Citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), however, petitioner argues that the pending State court appeal does not preclude jurisdiction under Section 1257. *See* Cert. Pet. 3.[3] *Cox* represents a line of cases where this Court has found finality under Section 1257, despite the pendency of State court preceedings, in limited circumstances where the federal issues have been finally decided by the State's highest court, the remaining State court preceedings involve only collateral, non-federal issues, and important policy considerations favor immediate review of the federal issues in this Court. *See, e.g., North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. at 159-64.[4]

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[3]Because the petitions at issue are virtually identical, reference throughout is made to the petition in No. 91-2034 as "Cert. Pet.___," and the appendix thereto as "Apx. Vol.__, at__." The appendix to this brief in opposition is cited as "App._a."

[4]*Cox*, 420 U.S. at 479-85, identified four circumstances where finality can exist despite pending proceedings in the State courts: (1) where for all practical purposes the federal issue is conclusively determined, so that, for example, only ministerial acts remain; (2) where the federal issue is finally decided by the State's highest court, and will survive and require review regardless of the outcome of further State court proceedings; (3) where the federal issue is finally decided, but with further proceedings in the State courts, regardless of their outcome, later review of the federal issue cannot be had; and (4) where the federal issue has been finally decided, reversal on the federal issue could be dispositive, and refusal immediately to review the State court decision could seriously erode federal policy.

But although *Cox* represents the "practical rather than a technical construction" this Court has applied to the finality requirement, *see Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949), this approach is not meant to "swallow the rule" of finality embodied in Section 1257, *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), and in situations falling outside the categories mentioned in *Cox*, it still remains true that the existence of pending State court proceedings will preclude review in this Court. In *Flynt*, for example, this Court concluded that it lacked jurisdiction under Section 1257 to review a State supreme court decision rejecting a claim of discriminatory prosecution asserted by the publisher of an allegedly obscene magazine. Although the publisher claimed that the prosecution violated his federal rights, and that a favorable ruling on constitutional grounds would terminate the litigation, this Court found that the State court judgment was not "a final judgment within any of the four exceptions identified in *Cox*," and that Supreme Court review could "await final judgment without any adverse effect upon important federal interests." *Id.* at 621, 622.

None of the *Cox* exceptions to the finality rule apply in this case simply because the New Jersey Supreme Court's decision never reviewed the trial court's dismissal of petitioner's complaint brought on behalf of himself at all, but instead merely denied leave to appeal. The issues raised in petitioner's pending appeal in the New Jersey Appellate Division are not collateral state-law issues, but are the very same federal issues petitioner seeks to bring before this Court. Consequently, petitioner's federal issues have not yet been conclusively adjudicated in the State courts, and there is no final judgment on his federal claims brought as an individual. Therefore, this Court lacks

jurisdiction under Section 1257.[5]

B. Petitioner Has No Standing To Raise Claims On Behalf Of The Fetus.

The law is clear that a fetus is not a person under the Fourteenth Amendment of the United States Constitution. *See infra* at 21-26. The conclusion necessarily follows that "an unborn child and persons acting in behalf of an unborn child may not assert the deprivation of any rights or privileges secured by the Amendment." *Poole v. Endsley*, 371 F. Supp. 1379, 1382-83 (N.D. Fla. 1974), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975). *See also Brady v. Doe*, 598 S.W.2d 338 (Tex. Civ. App. 1980), *cert. denied*, 449 U.S. 1081 (1981); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 58 (Ch. Div. 1977) (dismissing claim to enjoin woman's abortion brought by self-described guardian *ad litem* on

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[5]Petitioner's reliance on 28 U.S.C. § 1651 as an alternative basis for jurisdiction is misplaced. *See* Cert. Pet. 4. Section 1651 authorizes the Supreme Court to issue "all writs necessary or appropriate in aid of their respective jurisdictions." However, as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) it was established that the All Writs Act does not, as petitioner suggests, confer, restrict, or expand jurisdiction. Federal courts may issue writs by the authority of Section 1651 only in aid of jurisdiction already conferred. *See Total Care, Inc. v. Sullivan*, 754 F. Supp. 1097, 1103 (W.D.N.C. 1991) (basis for authority to issue an injunction but not a basis of jurisdiction); *Brittingham v. Commissioner*, 451 F.2d 315, 317 (5th Cir. 1971) (by itself creates no jurisdiction in the district courts, but is in aid of jurisdiction previously acquired on some other independent ground); *Haggard v. Tennessee*, 421 F.2d 1384, 1386 (6th Cir. 1970) (power to issue writs "only as ancillary to and in aid of jurisdiction otherwise vested"); *see also Hertz v. Record Publishing Co.*, 219 F.2d 397, 398 (3rd Cir.), *cert. denied*, 349 U.S. 912 (1955); *Hurt v. Cotton States Fertilizer Co.*, 159 F.2d 52, 60 (5th Cir.), *cert. denied*, 331 U.S. 828 (1947); *Covington & C. Bridge Co. v. Hager*, 203 U.S. 109 (1906).

behalf of fetus); *In re D.K.*, 204 N.J. Super. 205, 497 A.2d 1298, 1302-03 (Ch. Div. 1985) (reversing appointment of guardian for the fetus as "unconstitutional and void").

Courts have refused to recognize claims of purported guardians *ad litem* in abortion cases. Guardians *ad litem* for fetuses have been denied standing to intervene and challenge a woman's right to choose abortion, even though the requirements of standing for purposes of intervention are more easily met than those for purposes of bringing a claim. *See, e.g., Woe v. Bear*, No. H-79-1866 (S.D. Tex. May 5, 1980); *Margaret S. v. Edwards*, No. 78-2765 (E.D. La. Oct. 2, 1978); *Akron Center for Reproductive Health v. City of Akron*, No. C78-155A (N.D. Ohio May 16, 1978); *Zbaraz v. Quern*, No. 77-C-4522 (N.D. Ill. May 15, 1978) (subsequent history on merits omitted); *Ryan v. Klein*, 412 U.S. 924 (1973);[6] *Doe v. Bolton*, 319 F. Supp. 1048, 1057 (N.D. Ga. 1970) (three-judge court), *modified on other grounds*, 410 U.S. 179 (1973). *See also* Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians Ad Litem for Fetuses and Embryos*, 66 Wash. L. Rev. 503 (1991).

Because a guardian *ad litem* can only claim the interests of the fetus he purports to represent, and the fetus is not a "person" under the Fourteenth Amendment,

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[6]In *Ryan*, intervenors purporting to represent embryos and fetuses appealed the ruling of a three-judge court holding unconstitutional New York's refusal to fund legal abortions. In a separate appeal by the State, this Court vacated the district court order and remanded the case for reconsideration in light of *Roe v. Wade*. *Commissioner of Social Servs. v. Klein*, 412 U.S. 925 (1973). On the intervenors' appeal, however, this Court summarily affirmed the district court, thus indicating its refusal to recognize claims of purported guardians *ad litem* in abortion cases.

petitioner has no standing to raise the constitutional rights of the fetus, and that claim is not properly before this Court.

C. Petitioner's Constitutional Rights Under The Fourteenth Amendment Are Not Implicated Because There Is No State Action.

The federal questions assertedly raised by the petition concern petitioner's rights under the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 2, 4. But the assertion that respondent's private abortion decision somehow implicates petitioner's constitutional rights is utterly frivolous. The federal constitutional rights cited by petitioner -- the right to procreate, the right to companionship with one's child and to discharge one's duties to one's child, and the right to equal protection of the laws -- protect a person only against *governmental* action. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment." *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982). Every case petitioner cites as support for his constitutional claims involves government action affirmatively discriminating against or interfering with the autonomy of private individuals.[7]

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[7]*See Santosky v. Kramer*, 455 U.S. 745 (1982) (*state* may not sever parental rights absent clear and convincing evidence of unfitness); *Craig v. Boren*, 429 U.S. 190 (1976) (*state* may not discriminate on the basis of gender in the sale of alcoholic beverages); *Stanley v. Illinois*, 405 U.S. 645 (1972) (*state* may not sever parental rights based on umarried status); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (*state and federal governments* may not deny welfare benefits to individuals who had resided in the administering jurisdictions for less than one year); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*state* may not prohibit sale of contraceptives to married individuals); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (*state* may not sterilize persons convicted of crimes);

This, however, is not such a case.

For example, the Constitution certainly protects petitioner's right to be free from government intrusion into his decision to have a child. But it is up to petitioner, not lower court judges, to find a woman who will have a child with him. Rather than seeking protection against state interference with his constitutional rights, petitioner actually seeks to enlist the aid of the courts to seize control of V.C.'s body and compel her to bear his child. But the rights petitioner describes "involve[] a shield for the private citizen against governmental action, not a sword of government assistance to enable [the potential father] to overturn the private decisions of his fellow citizens." *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128, 132 (1974). Petitioner improperly seeks to twist constitutional shields designed to protect individuals from government intrusion, into swords of government coercion to subordinate women.

Thus, because on their face the federal claims petitioner raises are wholly without merit, his mere allegation of a federal question does not establish jurisdiction in this Court. Where, as here, "such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no real room for controversy," no jurisdiction lies. *Equitable Life Ins. Soc'y v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174, 176 (1922).

COUNTERSTATEMENT OF THE CASE

Petitioner, J.M., filed a complaint alleging a

Pierce v. Society of Sisters, 268 U.S. 510 (1925) (*state* may not prohibit parents from sending their children to private schools).

relationship with respondent, V.C., which began in 1991. It is undisputed that the parties are not married. According to the complaint, in January 1992, V.C. became pregnant and decided to seek an abortion.

After retaining an attorney, on March 9th, petitioner filed a complaint in the Superior Court of New Jersey, Chancery Division. That same day, proceeding *ex parte* and without prior notice to V.C., petitioner applied for and was granted a temporary restraining order ("TRO") that, *inter alia*, enjoined V.C. from terminating her pregnancy and from leaving the State of New Jersey for the purpose of terminating her pregnancy. Petitioner's requested relief, and the TRO that was entered, provided no exception should the continuation of V.C.'s pregnancy pose a threat to her life or health.

V.C. moved on notice to dissolve the restraints and dismiss petitioner's complaint for failing to state a claim upon which relief could be granted. On March 19th, after hearing argument from counsel, the trial court (1) dismissed petitioner's complaint to the extent it was brought by J.M. individually for lack of standing; (2) but declined to dismiss the complaint brought on behalf of the fetus; (3) appointed J.M. guardian *ad litem* to represent the interests of the fetus; and (4) therefore continued the restraints imposed on V.C.[8]

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[8] Contrary to petitioner's suggestion, *see* Cert. Pet. 11-12, no trial or evidentiary hearing of any kind was ever held in the courts below, no "testimony" was ever presented, and the trial court never made any factual findings. The "testimony" to which petitioner repeatedly refers, and which is reproduced in the appendix to the petition, consists of affidavits petitioner offered in the court below together with transcripts of testimony *in another case* involving a completely different set of litigants. The Law Division judge in that case found that the "proofs were so limited and so one-sided that a judge cannot sensibly make a

On March 20, 1992, V.C. moved on an emergent basis in the Appellate Division for leave to appeal from the trial court's order imposing the temporary restraints and declining to dismiss the complaint brought on behalf of the fetus. On March 23rd, petitioner moved for leave to cross-appeal from the dismissal of the complaint brought on behalf of himself individually.

On March 23, 1992, after hearing argument from counsel, the Appellate Division: (1) denied J.M.'s motion to cross-appeal the dismissal of his individual action; but also (2) denied V.C.'s motion for leave to appeal the trial court's order denying her motion to dismiss the complaint in its entirety; and (3) granted V.C.'s motion for leave to appeal the trial court's order continuing the temporary restraints and summarily reversed and vacated the imposition of those restraints; but (4) stayed the dissolution of the restraints until 4:00 p.m. the next day.

Both sides sought leave to appeal to the Supreme Court of New Jersey on an emergent basis. V.C. moved to lift the stay, remove the restraints, and dismiss the complaint in its entirety. Petitioner sought to maintain the restraints, reverse the dismissal of his individual complaint, and have the entire matter remanded to the trial court for an evidentiary hearing on his contention that life begins at conception.

On March 24, 1992, determining that petitioner had "failed to demonstrate a reasonable likelihood of prevailing on the merits of his complaint," and concluding "that under current law, plaintiff's proffer of proofs would not realistically assist or inform the court in its determination of

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definite finding of fact based upon them." *State of New Jersey v. Loce*, No. 251-91, slip op. at 8 (N.J. Law Div. Sept. 6, 1991).

the legal issues properly before it," *see* Apx. Vol. II, at 106, the New Jersey Supreme Court unanimously: (1) granted V.C.'s motion for leave to appeal the denial of her motion to dismiss the complaint brought by petitioner as guardian *ad litem* for the fetus, and dismissed the complaint; (2) granted V.C.'s motion to lift the stay of the Appellate Division's order dissolving the temporary restraints entered by the trial court, thereby dissolving the restraints; (3) denied petitioner's motion for leave to appeal the dissolution of the temporary restraints by the Appellate Division, dismissed as moot petitioner's motion for summary reversal, and denied petitioner's motion for a further stay; and (4) denied petitioner's motion for leave to appeal the dismissal of the his individual complaint and dismissed as moot his motion for summary reversal on that issue[9]

On March 31, 1992, petitioner moved in the New Jersey Supreme Court for reconsideration of the dismissal of his claim as guardian *ad litem* for the fetus, and moved in the Chancery Division for reconsideration of the dismissal of his claim as an individual. Petitioner's motion for reconsideration in the New Jersey Supreme Court was denied on April 6th, and his motion for reconsideration in

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[9] Apparently in an effort to characterize the New Jersey Supreme Court's decision as final, petitioner claims that the New Jersey Supreme Court "declared that J.M.'s individual case was 'moot.'" Cert. Pet. 4. This is not true. Rather, the New Jersey Supreme Court merely stated that because petitioner was denied leave to appeal, his *motion* for summary reversal was "dismissed as moot." *See* Apx. Vol. I, at 108-09.

On March 25th, petitioner applied to Associate Justice David H. Souter for a stay of the New Jersey Supreme Court's decision. Justice Souter denied the stay. That same day petitioner reapplied to Associate Justice Clarence Thomas, who also denied the stay.

the trial court was denied on May 12th.

On May 18, 1992, petitioner filed a notice of appeal as of right from the trial court order entered on March 19th dismissing his individual complaint. This appeal is still pending before the Superior Court of New Jersey, Appellate Division.

REASONS THE PETITIONS SHOULD BE DENIED

The petitions should be denied because they fail to establish any of the factors that weigh in favor of review on a writ of certiorari: This Court's prior decisions are dispositive, the New Jersey Supreme Court properly applied those decisions, and no conflict exists among state or federal appellate courts as to the proper disposition of this case. *See* Sup. Ct. R. 10.1. As every appellate court has recognized, and as this Court has just recently reaffirmed, *Roe v. Wade* and its progeny clearly protect the right of every woman, including respondent, to choose to terminate her pregnancy prior to viability.

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE NEW JERSEY SUPREME COURT.

A. Every Woman Has A Constitutional Right To Decide Whether Or Not To Terminate Her Pregnancy.

Petitioner argues that the New Jersey Supreme Court's decision to dissolve the restraints imposed on V.C.'s decision to terminate her pregnancy somehow conflicted with this Court's decisions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), *Hodgson v. Minnesota*, 497 U.S. 417 (1990) and *Ohio v. Akron Center*

for Reproductive Health, 497 U.S. 502 (1990). *See* Cert. Pet. 57-58. Petitioner makes no serious effort to identify any actual conflict between these cases and the decision of the court below. But insofar as petitioner's argument is comprehensible at all, it appears that he believes that these decisions establish that a woman no longer has a constitutional right to decide whether to terminate her pregnancy, and that in any case respondent's rights are outweighed by the asserted "rights" of petitioner and the fetus. *See* Cert. Pet. 60-61, 63-65. Both claims are demonstrably false.

In 1973, this Court recognized that the Constitution guarantees every woman the right to determine whether or not to terminate her pregnancy prior to viability. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Since that first clear recognition of a woman's right to choose, *Roe*'s holding has been consistently reaffirmed. *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). More than a decade after *Roe*, this Court reiterated that:

> Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy.

Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986).

Only a month ago, this Court concluded that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed." *Planned Parenthood v. Casey*, 60

U.S.L.W. 4795, 4798 (U.S. June 29, 1992).[10] In *Casey*, any questions regarding a woman's right to choose abortion were unambiguously answered:

> An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant . . . .

Casey, 60 U.S.L.W. at 4803.

Specifically, this Court's decision in *Casey* unequivocally confirmed a woman's constitutional right to choose abortion prior to viability unfettered by State interference:

> The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.

Casey, 60 U.S.L.W. at 4805.

For a State to prevent a woman from obtaining an abortion prior to fetal viability would violate her constitutionally guaranteed right to reproductive autonomy. Although this Court recognized that "the State has legitimate interests from the outset of the pregnancy in

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[10] Contrary to petitioner's repeated insistence here and in the courts below, *see* Cert. Pet. 58-60; Apx. Vol. II, at 67-71, in *Webster* "a majority of the Court either decided to reaffirm or declined to address the constitutional validity of the central holding of *Roe*." *Casey*, 60 U.S.L.W. at 4802.

protecting the health of the woman and the life of the fetus," *Casey*, 60 U.S.L.W. at 4798, before viability "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* at 4798.[11] Therefore, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the intimate decision to terminate her pregnancy before viability." *Id.* at 4807.

By seeking a court order absolutely prohibiting V.C. from having an abortion, petitioner would completely obliterate the constitutionally protected right to privacy recognized in *Roe* and reaffirmed in *Casey*.[12]

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[11] Even after viability, a State that chooses to regulate abortion must always provide exceptions to protect the woman's life *and* health. *Casey*, 60 U.S.L.W. at 4798, 4807-08. Thus, this Court continues to reject the argument advanced by petitioner that a State may only allow abortion where necessary to save the woman's life. Cert. Pet. 64 n.46.

[12] Of course, the injunction petitioner sought below constituted State action, even though the operative State actor was a court and not the legislature or executive. "A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way." *Ex Parte Virginia*, 100 U.S. 339, 347 (1880), *quoted in*, *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). There has been no erosion of principle on this issue. "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Palmore v. Sidoti*, 466 U.S. 429, 432 n.1 (1984). For example, recently this Court broadened the category of potential parties whose actions may fall within the umbrella of State action, by holding that a private litigant's use of preemptory challenges in a civil case to exclude jurors on account of their race, constitutes a constitutional deprivation involving State action. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991). Following this Court, lower courts have consistently held that an injunction prohibiting a woman

Consequently, the New Jersey Supreme Court properly applied this Court's precedent in lifting the restraints imposed on V.C.[13]

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from having an abortion constitutes State action. *See, e.g., Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57, 59 (Ch. Div. 1977).

[13] Because petitioner's requested relief in the courts below even prohibited V.C. from leaving the State to obtain an abortion, the injunction also violated respondent's constitutional right to travel. This Court first recognized a right to interstate travel in 1868 when it invalidated Nevada's attempt to tax persons leaving the State. *See Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868). Since *Crandall*, the right to interstate travel has been "virtually unqualified." *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). As stated in *Williams v. Fears*, 179 U.S. 270, 274 (1900):

> Undoubtedly, the right to locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.

In 1973, this Court held that State imposed obstructions on a woman's right to travel to obtain an abortion were invalid. Holding that the right to travel "must . . . protect persons who enter Georgia seeking the medical services that are available there," this Court invalidated Georgia's residency requirement for abortion as discriminatory against those women traveling from out-of-state to obtain those services. *Doe v. Bolton*, 410 U.S. 179, 200 (1973). Two years later, this Court stated that Virginia could not "prevent its residents from traveling to New York to obtain those [abortion] services, or, as the State conceded . . . prosecute them for going there." *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975).

Therefore, in dissolving the temporary restraining order preventing V.C. from obtaining an abortion in New Jersey, or from traveling outside of New Jersey to obtain an abortion, the New Jersey Supreme Court also properly applied this Court's decisions protecting the right to

B. A Man Does Not Have A Constitutional Right To Interfere With A Woman's Decision To Have An Abortion.

Alternatively, petitioner contends that the New Jersey Supreme Court's decision somehow conflicts with the decisions of this Court that allegedly recognize the right of a man, both individually and as representative of the interests of the fetus, to prevent a woman from obtaining an abortion. *See* Cert. Pet. 62-63. As already explained, none of these asserted "rights" can possibly be implicated in this case, because there is no governmental action that interferes with petitioner's interests. *See supra* at 8-9.[14] But even aside from the absence of State action necessary to trigger constitutional protection of petitioner's rights, the simple fact is that petitioner does not and cannot cite any case that actually holds that a man, in any capacity, has any right to interfere with a woman's decision to have an abortion. In fact, the applicable precedent is directly to the contrary.

As this Court recently held in *Casey*, a State cannot interfere with a woman's choice to have an abortion prior to fetal viability. For precisely this reason, the State cannot delegate such power to veto an abortion prior to fetal viability to any other third party. Justice Blackmun, writing for this Court in *Planned Parenthood v. Danforth*,

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travel.

[14] For this reason, the asserted "important questions of federal constitutional law" which petitioner claims are left unsettled by this Court's prior decisions, *see* Cert. Pet. 14-15, are frivolous indeed. Petitioner argues that this Court has only resolved whether a State may prohibit abortion, as opposed to how a conflict between private individuals should be resolved. But in the absence of State action, such a private dispute raises no federal constitutional issues at all.

428 U.S. 52 (1976), struck down a requirement of husband consent for abortion, explaining:

> Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and the patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period.

Danforth, 428 U.S. at 69.

Although petitioner complains that *Danforth* failed to address the interests of the man in the abortion decision, this is clearly wrong. The Court said:

> We are not unaware of the deep and proper concern that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying.

Id. Nevertheless, the Court held:

> It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and the husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue. . . .
>
> We recognize, of course, that when a woman, with the approval of her physician but without the approval of her husband, decides to terminate her pregnancy, it could be said that she is acting unilaterally. The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the

> two marriage partners can prevail. Inasmuch as it is the woman who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor.

Id. at 71. As this Court recognized in *Eisenstadt v. Baird*, 405 U.S. 438 (1972):

> [T]he marital couple is not an independent entity with the mind and heart of its own, but an association of two individuals each with a separate intellectual makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to bear or beget a child.

Id. at 453 (emphasis in original).

In the courts below, petitioner argued that *Danforth* was no longer good law, *see* Apx. Vol. II, at 84, but this Court's decision in *Casey* refutes that position. In striking down Pennsylvania's requirement of husband notification for abortion, this Court relied upon and reaffirmed the holding in *Danforth*. *See Casey*, 60 U.S.L.W. at 4812. Distinguishing the very cases petitioner relies on here, *see* Cert. Pet. 62 n.45, this Court recognized that although "with respect to a living child" it "would be reasonable to conclude as a general matter" that the father's and mother's interests are equal, "[b]efore birth, . . . the issue takes on a very different cast. It is an inescapable biological fact that state regulation with respect to the child a woman is carrying will have a far greater impact on the mother's liberty than on the father's." *Casey*, 60 U.S.L.W. at 4812. For this reason, this Court held, the Constitution protects women from unjustified State interference with their

abortion decisions, "even when that interference is enacted into law for the benefit of their spouses." *Id.* at 4813.

> The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife. The contrary view leads to consequences reminiscent of the common law. A husband has no enforceable right to require a wife to advise him before she exercises her personal choices. . . . A State may not give to a man the kind of dominion over his wife that parents exercise over their children.

Id.

But if a State cannot compel a woman to notify her husband of her abortion decision, *a fortiori* a *non-spouse* cannot be given a *veto* over that choice. The injunction sought by petitioner therefore was an even more extreme invasion of the right of privacy than the statute struck down in *Casey*, and in lifting the injunction the New Jersey Supreme Court correctly followed binding precedent.

C. A Fetus Is Not A "Person" Within The Meaning Of The Fourteenth Amendment.

Petitioner's final argument for granting a writ of certiorari is somewhat incoherent. On the one hand, petitioner argues that the New Jersey Supreme Court's decision conflicts with this Court's prior decisions which allegedly hold that a fetus is a "person" protected by the Fourteenth Amendment of the United States Constitution. *See* Cert. Pet. 60-61. On the other hand, apparently acknowledging that the holding in *Roe v. Wade* is directly to the contrary, *see* Cert. Pet. at 22-23, petitioner urges

that *Roe* should be overruled. Cert. Pet. 29-32, 56-57. Both arguments are without merit.

Roe v. Wade presented the first opportunity to decide whether a fetus is a "person" under the Fourteenth Amendment. After examining both the language of the Fourteenth Amendment and the relevant case law, this Court held that as a matter of law, a fetus is not recognized as a "person" and has no independent rights under the law. *See Roe*, 410 U.S. at 157-58. "[T]he unborn have never been recognized in the law as persons in the whole sense," this Court held, and "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158, 162. Since *Roe*, this Court has repeatedly refused to recognize independent fetal rights. *See Colautti v. Franklin*, 439 U.S. 379 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *Cf. International Union, U.A.W. v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991) (employer's "fetal protection" policy excluding women with child-bearing capacity from lead-exposed jobs violates Title VII). As Justice Stevens stated in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), "[n]o member of this Court has ever suggested that a fetus is a 'person' within the meaning of the Fourteenth Amendment." *Id.* at 779 n.8 (Stevens, J., concurring). Most recently, in *Casey* Justice Stevens reiterated:

> Thus, as a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.

Casey, U.S.L.W. at 4817 (Stevens, J., concurring in part and dissenting in part).

Indeed, even Justice Scalia's opinion in *Casey* lends no support to petitioner's contention that a fetus is guaranteed constitutional rights. Justice Scalia argued that the "States may, if they wish, permit abortion-on-demand, but the Constitution does not *require* them to do so." *Id.* at 4836 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). But if a fetus were recognized as a "person" with rights guaranteed under the Fourteenth Amendment, presumably States would be prohibited from allowing legalized abortion.

Thus, petitioner's contention that the New Jersey Supreme Court contradicted this Court's prior decisions is wholly fallacious. Perhaps recognizing as much, petitioner argues in the alternative that *Roe* should be overruled, but he submits no persuasive reason for doing so. Brushing aside concerns for *stare decisis*,[15] petitioner at first apparently admits that whether a fetus is a "person" under the Fourteenth Amendment is a legal question. *See* Cert. Pet. 24; *see also id.* at 26 ("when human life begins is truly a legal question"). But having conceded this point, petitioner can point to *no* development in the law that

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[15]Petitioner argues that *stare decisis* is "not a bar" to overruling *Roe* simply because this Court has overruled prior decisions before. Cert. Pet. 30. But in *Casey*, using a somewhat less simplistic analysis, this Court cogently observed:

> A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law.

Casey, 60 U.S.L.W. at 4805.

undermines *Roe*'s holding that a fetus is not a "person" under the Fourteenth Amendment. Indeed, lower court's have consistently followed this holding,[16] and petitioner cites no contrary authority.[17]

Recognizing the untenable nature of his position, petitioner shifts ground and argues instead that whether a

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[16]*Ruiz Romero v. Gonzales Caraballo*, 681 F. Supp. 123 (D.P.R. 1988) (infant may not maintain claim under 42 U.S.C. § 1983 for prenatal injuries); *Harman v. Daniels*, 525 F. Supp. 798 (W.D. Va. 1981) (fetus has no cause of action under 42 U.S.C. § 1983 or under the Constitution); *Civic Awareness of America, Ltd. v. Richardson*, 387 F. Supp. 1086 (E.D. Wis. 1975) (taxpayers lack standing to sue on behalf of fetuses), *aff'd*, 532 F.2d 756 (7th Cir.), *cert. denied*, 429 U.S. 829 (1976); *Poole v. Endsley*, 371 F. Supp. 1379 (N.D. Fla. 1974) (fetus not a child for purposes of Social Security Act and has no cause of action under Section 1983 or Fourteenth Amendment), *aff'd in part & remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975).

[17]Conflating two separate issues, petitioner argues that the State's interest in potential life necessarily confers the status of legal personhood on the fetus. *See* Cert. Pet. 60-62. Once again, petitioner's confusing argument is presented with citations that, when examined, do not support his position. *Snapp v. Puerto Rico*, 458 U.S. 592 (1982), the primary case petitioner relies on, has absolutely nothing to do with abortion and, in any case, stands for exactly the *opposite* of what petitioner asserts. In *Snapp* this Court held that the common law approach to *parens patriae* standing that petitioner advocates here

> has relatively little to do with the concept of *parens patriae* standing that has developed in American law. That concept does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves. In fact, if nothing more than this is involved -- i.e., if the state is only a nominal party without a real interest of its own -- then it will not have standing under the *parens patriae* doctrine.

Snapp, 458 U.S. at 600.

fetus is a "person" turns on "when the life of a human being commences [which] is, fundamentally a question of fact." Cert. Pet. 30. Petitioner then launches into a lengthy and often unintelligible discussion of alleged "recent scientific discoveries" (based in large part on materials never submitted in the courts below). Apparently, this exposition is designed to demonstrate that life begins at conception, although petitioner's repeated focus on late term abortions suggests he is advancing a somewhat more modest claim. *See, e.g.*, Cert. Pet. 56-57.

In any case, petitioner's argument is fatally flawed in at least two respects. First, petitioner never explains why the legal question of whether a fetus is a "person" under the Fourteenth Amendment turns on whether life begins at conception. Second, petitioner's factual assertions, whatever they may be worth, go not to the issue of when life begins, in terms of what characteristics a fetus must possess to be deemed human, but rather to what characteristics a fetus possesses. The proferred evidence does not prove that life begins at conception, but merely begs the question. In other words, the fact that an eight-week old fetus has fingers is not probative, for example, unless we know that fingers are what define human life.

Petitioner's factual assertions cannot answer this "difficult question of when life begins" precisely because it is a metaphysical issue whose philosophical and theological components necessarily frustrate consensus.

> When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.

Roe, 410 U.S. at 159.

In fact, there is no consensus in the scientific community that life begins at conception. *See*, *e.g.*, Declaration of Michael V.L. Bennett, paras. 2-9 (May 15, 1990), filed in *Doe v. Ada*, No. 90-00013 (D. Guam), App. 4a-8a.[18] *See also Webster*, 492 U.S. at 571 & n.16 (Stevens, J., concurring in part and dissenting in part) ("the intensely divisive character of the national debate over abortion reflects the deeply held religious convictions of many participants in the debate. . . . No fewer than 67 religious organizations submitted their views as *amicus curiae* on either side of [the] case"). In hearings before Congress on the so-called "Human Life Bill," for example, the National Academy of Sciences stated that "[d]efining the time at which the developing embryo becomes a person must remain a matter of moral or religious value." App. 6a. Likewise, Joseph Boyle, M.D., the Chair of the Board of Trustees of the American Medical Association, testified that the question of whether human life begins at conception goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns." App. 7a.[19]

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[18]The Bennett Declaration was submitted by respondent in the courts below and made part of the record. *See* App. 1a-3a.

[19]Petitioner concedes that there is no consensus in the scientific community for the view that life begins at conception, but he insists that scientists who do not share this belief are merely "inject[ing] their personal religious, moral and social bias [sic] into their answer." Cert. Pet. 26. With all due respect, it is petitioner's view that "the human is biologically complete at conception," *id.*, that reveals a profound confusion of science and religion. Curiously, in his original certification in support of his application for temporary restraints, petitioner did not mention any "scientific" evidence at all, but instead expressed his opposition to abortion largely in terms of his religious

II. THE NEW JERSEY SUPREME COURT'S DECISION CONFORMS WITH THE DECISIONS OF EVERY APPELLATE COURT TO CONSIDER THE ISSUE.

A. No State Appellate Court Has Ever Held That A Man May Prevent A Woman From Obtaining An Abortion.

Since this Court's decision in *Roe v. Wade*, literally dozens of cases brought by husbands or putative boyfriends have sought to prevent women from exercising their right to choose abortion. To respondent's knowledge, every case has rejected the precise arguments petitioner makes here, and has held that a man does not have the right to a court order enjoining a woman from exercising her abortion right. This has been true in cases where the man seeking the court order was the woman's husband, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *cert. denied*, 488 U.S. 955 (1988); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115, *cert. denied*, 298 Md. 353, 469 A.2d 1274 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974); *Meyers v. Lewis*, No. 111440 (Mich. App. Sept. 15, 1988), *appeal denied*, No. 841469 (Mich. Sept. 22, 1988), *cert. denied*, 488 U.S. 967 (1988); *Steinhoff v. Steinhoff*, No. 10549/88 (N.Y. Sup. Ct. June 29, 1988); *Anderson v. Anderson*, No. 8821320 (Minn. Dist. Ct. July 8, 1988); *Hayes v. Hayes*, No. 85-CI-04460 (Tex. Dist. Ct. Mar. 27, 1985), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *see Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), *cert. denied*, 429 U.S. 919 (1989); *Doe v.*

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beliefs. *See* Apx. Vol. I, at 18-19.

Roe, No. 88-1629 (N.Y. Sup. Ct. Sept. 14, 1988), *appeal dismissed as moot*, 552 N.Y.S.2d 75 (App. Div. 1990); *Rothenberger v. Doe*, 149 N.J. Super. 478, 374 A.2d 57 (Ch. Div. 1977); *Jones v. Smith*, 278 So.2d 339 (Fla. 1973), *cert. denied*, 415 U.S. 958 (1974); *Pagel v. Roe*, No. 83-765 (Wis. Ct. App. Apr. 21, 1983); *Yozie v. Munson*, No. 82/19 56 S (Conn. Super. Ct. Sept. 28, 1982). *See also Przybyla v. Przybyla*, 87 Wis. 2d 441, 275 N.W.2d 112 (Ct. App. 1978) (woman's exercise of right to terminate her pregnancy without consent of husband cannot support recovery by husband for intentional infliction of emotional distress).

Throughout this litigation, petitioner has cited not even one case in conflict with the New Jersey Supreme Court's decision below. This case and the foregoing authorities were correctly decided, and there is no reason to disturb this clear and unbroken line of precedent.

B. Every Federal Court To Address The Issue Has Held That Husband Notice Or Consent Requirements For Women Seeking Abortion Are Unconstitutional.

Just as State courts have consistently held that men do not have a right to court orders enjoining their wives or girlfriends from having abortions, since this Court's decision in *Danforth* invalidating Missouri's requirement of spousal consent for abortion, to respondent's knowledge every federal court to address the issue has struck down related statutory requirements of husband notice or consent for abortion. *See, e.g.*, *Planned Parenthood v. Casey*, 947 F.2d 682, 709-15 (3d Cir. 1991) (invalidating husband notice requirement), *aff'd*, 60 U.S.L.W. 4795 (U.S. June 29, 1992); *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980) (same); *Eubanks v. Brown*, 604 F. Supp. 141, 148 (W.D.

Ky. 1984) (same); *Planned Parenthood v. Board of Medical Review*, 598 F. Supp. 625, 637 (D.R.I. 1984) (same); *Scheinberg v. Smith*, 482 F. Supp. 529 (S.D. Fla. 1979), *aff'd in part, vacated in part, & remanded*, 659 F.2d 476 (5th Cir. Unit B Oct. 1981), *on remand*, 550 F. Supp. 1112 (S.D. Fla. 1982); *Doe v. Deschamps*, 461 F. Supp. 682, 686 (D. Mont. 1976) (same); *Wolfe v. Schroering*, 541 F.2d 523 (6th Cir. 1976) (invalidating husband consent requirement even in second trimester).

Plainly, the decision of the New Jersey Supreme Court was fully in accord with these federal decisions. Once again, petitioner cites no contrary authority, nor provides any reason for departing from this consistent line of cases.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

July 23, 1992

Respectfully submitted,

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APPENDIX

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On Behalf of the ACLU of New Jersey
Attorneys for Defendant V.C.

J. M., Individually and as guardian ad litem of his unborn child,	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION
Plaintiff,	:	DOCKET NO. MON-C-66-92
vs.	:	Appellate Docket Nos. AM-742-91TS, M-3884-91, M-3886-91
V.C., W.M.C., JOSEPH BLOW and RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation	:	Supreme Court Docket No. 35,000
	:	Civil Action
Defendants.	:	CERTIFICATION OF ANDREW DWYER IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

ANDREW DWYER hereby certifies as follows:

1. I am co-counsel for defendant in this case and am familiar with the facts and proceedings herein.

2. When defendant appealed to the New Jersey Supreme Court, seeking to lift the temporary restraints imposed on her and to dismiss the complaint, we submitted in support of her appeal, *inter alia*, the Declaration of Michael V.L. Bennett. Because of the emergent circumstances of this case, we did not previously submit this declaration to this Court or the Appellate Division. A true and correct copy of the Bennett Declaration is attached hereto.

3. The Bennett Declaration was originally submitted in support of plaintiff's motion for summary judgment in *Doe v. Ada*, No. 90-00013 (D. Guam) (*sub nom. Guam Soc'y of Obstetricians & Gynecologists v. Ada*). This case is a challenge to Guam's criminal abortion statute, and my office represents the plaintiffs who are challenging the law. The district court granted our motion and enjoined the statute, and its decision was recently affirmed by the Ninth Circuit. *See Guam Soc'y of Obstetricians & Gynecologists v. Ada*, No. 90-00013 (D. Guam Aug. 23, 1990), *Aff'd*, No. 90-16706 (9th Cir. Apr. 16, 1992).

4. The Bennett Declaration is relevant in this case, because it explains why the question of when life begins turns on religious, moral and philosophical considerations, such that it cannot be determined by "scientific" evidence alone.

5. In the New Jersey Supreme Court, plaintiff moved to strike this declaration (as well as another declaration submitted by defendant). The Court, however, denied this

motion in it entirety. Therefore, the Bennett Declaration is properly part of the record and before this Court.

6. I hereby certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

/s/
ANDREW DWYER

DATED: April 21, 1992

IN THE UNITED STATES DISTRICT COURT OF GUAM FOR THE TERRITORY OF GUAM

MARIA DOE, on behalf of herself and all others similarly situated, *et. al*,	)	CIVIL ACTION NO. 90-00013
Plaintiffs,	)	DECLARATION
vs.	)	OF MICHAEL V.L. BENNETT
JOSEPH F. ADA, *et. al.*,	)	
Defendants.	)	

1. I am a Professor and Chairperson of Neuroscience at the Albert Einstein College of Medicine in the Bronx, New York. I am a member of the National Academy of Sciences. Attached to this Declaration as Exhibit A is a copy of my curriculum vitae, which includes a list of some of my publications. I am submitting this Declaration in support of plaintiffs' motion for summary judgment and permanent injunction against Public Law 30-134 ("the Act").

2. There is no scientific consensus that a human life begins at conception, at a given stage of fetal development, or at birth. The question of "when a human life begins" cannot be answered by reference to scientific principles like those with which scientists predict planetary movement. The answer to that question will depend on each individual's social, religious, philosophical, ethical and moral beliefs and values. These answers do not represent any "scientific" truth, because they are based upon values

and beliefs, not upon science alone.

3. The only "consensus" that may be said to exist among scientists on the question of when a human life begins is that science alone cannot answer that question. This is demonstrated by the response of the scientific community when in 1981 a United States Senate subcommittee held hearings on a bill to declare "that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." *See The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Senate Committee of the Judiciary*, 97th Cong., 1st Sess. (1981) [hereinafter *Hearings*]. As distinguished scientists testified, science alone does not provide the answer to this question.

4. For example, Dr. Leon Rosenberg, then Chairman of the Department of Human Genetics, Yale University Medical School testified:

> When does this potential for human life become actual? As a scientist, I must answer I do not know. Moreover, I have not been able to find a single piece of scientific evidence which helps me with that question.
>
> Not surprisingly, a great deal has been spoken and written on the subject. Some people argue, as you have heard, that life begins at conception. . . .
>
> I have no quarrel with anyone's ideas on this matter so long as it is clearly understood that they are personal beliefs based on personal judgments and not scientific truths.

Id. at 50.

5. Dr. Rosenberg then explained the reason science alone cannot answer the question -- the inability to test the hypothesis by the scientific method:

> The scientific method depends on two essential things -- a thesis or idea and a means of testing that idea. Scientists have been able to determine, for instance, that the Earth is round or that genes are composed of DNA because, and only because, experiments could be performed to test these ideas. Without experiments there is no science, no way to prove or disprove any idea. I maintain that concepts such as humanness are beyond the purview of science because no idea about them can be tested experimentally.

Id.

6. The National Academy of Sciences was equally emphatic:

> It is the view of the National Academy of Sciences that the statement in [Senate Bill S. 158] cannot stand up to the scrutiny of science. This section reads: "The congress finds that present day scientific evidence indicates a significant likelihood that actual human life exists from conception." This statement purports to derive its conclusions from science, but it deals with a question to which science can provide no answer. The proposal in S. 158 that the term "person" shall include "all human life" has no basis within our scientific understanding. Defining the time at which the developing embryo becomes a person must remain a matter of moral or religious value.

Id. at 74. *See also id.* at 1035-36 (statement of Joseph Boyle, M.D., chairman of the board of trustees of the American Medical Association) (there is no scientific consensus that a human life begins at conception; that question goes "far beyond the realm of medical science and into social, religious, philosophical, ethical, and moral concerns").

7. Science can indeed provide valuable information and can answer concrete questions regarding prenatal development by identifying, for example, the stages of fetal brain development. But the question of when a human life truly begins calls for a conclusion as to which characteristics define the essence of human life.

8. Many other physicians and scientists made these observations at the 1981 hearings. *See, e.g., id.* at 68 (statement of Robert H. Ebert, M.D., President of Milbank Memorial Fund, Caroline Shields Walker, Professor of Medicine Emeritus, Harvard University) (whether a human life begins at conception is not a medical or scientific question, but a philosophical and religious question that "can be debated endlessly and has to do with how one defines a person and 'self'"); *id.* at 69-70 (statement of Sherman M. Mellinkoff, M.D., Dean of the UCLA School of Medicine) (same); *id.* at 71 (statement of Arno G. Motulsky, M.D., Professor or Medicine and Genetics, University of Washington) (same); *id.* at 113-14 (statement of Dr. Jessica G. Davis, Director, Child Development Center, Chief, Division of Genetics, North Shore University Hospital) (same). The subcommittee also received hundreds of letters from scientists and physicians across the country echoing Dr. Rosenberg's views. *See*

e.g., *Hearings app.* 414, 669, 716, 718.[1]

9. Science cannot define the essential attributes of human life any more than science can define such concepts as love, faith or trust. *Hearings* at 50. This United States Supreme Court was indisputably correct when it observed in *Roe v. Wade*, 410 U.S. 113, 159 (1973), that the question of when human life begins cannot simply be referred to an expert discipline for resolution.

10. While science cannot tell us which biological attributes establish the existence of a human being, science can tell us when certain biological attributes can be detected. For example, it is not until sometime after twenty-eight weeks of gestation that the fetal brain has the capacity to carry on the same range of neurological activity as the brain in a full-term newborn. Fetal brain development is obviously a long and incremental process. Brain cells in the neocortex, the portion of the brain in which the processes we call thought, emotion and consciousness occur, must be sufficiently developed to permit this kind of neurological activity to take place.

---

[1] The fact that the subcommittee itself could not reach agreement on the question further highlights the inability to find the answer in scientific truth. *The Human Life Bill -- S. 158: Report by the Subcommittee on Separation of Powers, Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 39, 41 (1981) (minority view of Senator Baucus) ("If the Hearings on S. 158 held by the Separation of Powers Subcommittee were conclusive on any point it is that in 1981 there remains no consensus among scientists, philosophers and theologians on the question of when life begins."). Indeed, the current Commissioner of the Food and Drug Administration, Frank E. Young, M.D., stated in 1981 that "science and medicine cannot unequivocally establish the time in the continuum of development where human life begins"; the decision is "in part moral, ethical, philosophical and religious." *Hearings app.* at 781.

11. At about twenty-eight weeks of gestation, brain development is marked by the sudden emergence of dendritic spines in the neocortex. Dendritic spines are essential components in the brain's cellular circuitry.[2] One study has indicated that neocortical cells possess no dendritic spines as late as 24 to 27 weeks of gestation.[3] It is also at that time that large-scale neocortical synaptogenesis (the development of neural connections between brain cells in the neocortex) begins,[4] although limited synaptogenesis may begin as early as 19 to 22 weeks of gestation.[5] Some primitive motor activities such as swallowing and spontaneous movement of limbs, begin between eight and thirteen weeks of gestation.[6] However, the thalamocortical connections which are prerequisites for neocortical reception of bodily sensation do not begin to develop until approximately 22 or 23 weeks.[7]

---

[2] M. Flower, *Neuromaturation and the Moral Status of Human Fetal Life* in Abortion Rights and Fetal Personhood 71, 77 (Doerr & Prescott ed. 1989) (emphasis in original) (forthcoming).

[3] D.P. Purpura, *Morphogenesis of Visual Cortex in the Preterm Infant* in Growth and Development of the Brain, 33, 46 (M.A.B. Brazier ed. 1975) (examining the visual cortex).

[4] *Id.* 45-46.

[5] Molliver, Kostovic & Van Der Loos, *The Development of Synapses in Cerebral Cortex of the Human Fetus*, 50 Brain Research 403-07 (1973).

[6] Flower, *supra* n.1 at 75.

[7] Kostovic & Goldman-Rakic, *Transient Cholinesterase Staining in the Mediodorsal Nucleus of the Thalamus and its Connections in the Developing Human and Monkey Brain*, 219 Journal of comparative Neurology 431-47 91983); Kostovic & Rakic, *Development of prestriate Visual Projections in the Monkey and Human*

12. In addition, regular patterned electro-encephalograms (EEGs) with characteristics of an adult EEG appear at approximately 30 weeks.[8] Of course, the fact that the fetus develops the bare biological capacity for crucial neurological processes does not necessarily mean that these neurological processes actually begin to occur in this period. Indeed, the cerebral cortex is relatively nonfunctional even in normal newborns.[9]

13. The neurobiological data indicate that the fetus lacks the physical capacity for the neurological activities we associate with human thought until sometime after 28 weeks gestation. In other words, the capacity for the human thought process as we know it cannot exist before that time. Thus, although people may have different views as to whether the capacity for human thought is relevant to status as a human being, the argument that a fetus should have the status of a born person because science shows that a fetus is able to think is false.

14. The Act's finding that human life begins at the moment of conception cannot draw support from science or scientific evidence. The Act's legislative findings represents the philosophical or religious judgment that human life begins at conception, and cannot be justified as legislation that merely restates a scientific fact.

Fetal Cerebrum Revealed by Transient cholinesterase Staining, 4 Journal of Neuroscience 25-42 (1984).

[8] Flower, *supra* n. 1 at 79.

[9] Shewmon, Capron, Warwick & Schulman, *The Use of Anencephalic Infants as Organ Donors: A Critique*, 261 Journal of American Medical Association 1773-18 (1989).

WHEREFORE, I respectfully request that the Court grant plaintiff's Motion for Summary Judgment and Permanent Induction.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 1990

/s/
Michael V.L. Bennett

Supreme Court, U.S.
FILED
AUG 10 1992
OFFICE OF THE CLERK

No. 91-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., individually

Petitioner,

-against-

V.C.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY ADDRESSING *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY*

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ARGUMENT

Introduction

J.M., in his individual capacity, submits this brief to show how *Planned Parenthood of S.E. Pa. v. Casey*, __ U.S. __ 1992 WL 142546 (U.S.) ("*Casey*") enhances the merits of his petition.[1]

J.M.'s own individual rights are dependent, in some measure, upon whether his unborn child is, in fact, a human being. By not reexamining the question of when the life of a human being begins, *Casey* failed to reexamine one of *Roe's* most essential elements. After all, the child is the very focus and subject of the national debate to which the *Casey* Court referred. Slip Op. at 19. The whole of abortion jurisprudence has been created and developed devoid of any analysis or resolution of the most critical question upon which the entire law depends.[2] It is not so much that *Casey* failed to reexamine a question wrongly decided in *Roe*, as much as *Roe* failed to answer it at all. In 1973 when *Roe* stated that the "point in the development of man's knowledge" was inadequate to determine when life begins, there was an implied promise to review the question when man's knowledge has reached the point

[1] This brief is substantively different from that filed by J.M., as guardian.

[2] See, related observation of Justice Scalia, dissenting, Slip Op. at 4.

of adequacy. *Roe v. Wade*, 410 U.S. 113, 159, 93 S.Ct. 705, 730. We are now at that point.

The *Casey* Court, being unable to affirm either *Roe's* correctness[3] or its morality,[4] concluded a mother's right to an abortion had to be preserved based upon *stare decisis* and special considerations because of a divisive national debate. J.M. in his individual capacity submits this brief to show how the aspects of *stare decisis* and the other concerns expressed by the *Casey* Court have no application to J.M.'s case.

When the unborn child is recognized as a separate and complete human being (capable of experiencing pain), *Roe* is in conflict with other sound principles of constitutional law, and has been the basis for developing law which is harmful and unjust. In addition, *Roe* should be overruled based upon the sound principles of *stare decisis* explained in Justice Brandeis' dissenting opinion in *Burnet*

[3] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding." *Casey*, Slip Op. at 29.

[4] "Some of us as individuals find abortion offensive to our most basic principles of morality, ..." (*Casey*, Slip Op. at 8)

v. Coronado Oil and Gas Co., 285, U.S. 393, 405-413 (1932) (Pet., 22-56). When *Roe* is thus observed *Roe* is seen as unworkable and any reliance on *Roe* is not of the type that would ever bar overruling an incorrect and harmful decision of the Court.

POINT I

ROE IS IN CONFLICT WITH OTHER PRINCIPLES OF CONSTITUTIONAL LAW. *ROE* HAS INFLUENCED AND SHALL CONTINUE TO INFLUENCE, DEVELOPMENTS AT ODDS WITH PERSONAL LIBERTIES AND SHALL PROMOTE HARMFUL CONDUCT WHICH *ROE* COMPELS STATES TO PROTECT.

Casey asserts "*Roe* portends no developments at odds with other precedent for the analysis of personal liberty", *Casey*, at 18, and "nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence." *Casey*, at 16. Both statements are glaringly inaccurate when it is recognized that the unborn child is a human being. In addition, *Roe* has been, and shall continue to be responsible for harmful human conduct which *Roe* compels states to protect.

A. *ROE* IS IN CONFLICT WITH OTHER CONSTITUTIONAL PRINCIPLES AND SHALL RESULT IN LAW AT ODDS WITH PRECEDENT FOR THE ANALYSIS OF PERSONAL LIBERTY.

1.

When J.M. asserts his own constitutional right to association and companionship with his child, he asserts in essence that New Jersey failed to protect his constitutionally protected parental rights.

By issuing an order in favor of V.C., J.M.'s rights were terminated. By relying upon *Roe*, this result conflicts with precedent for the analysis of J.M.'s liberty rights. *Casey*, at 18.

To terminate an individual's parental rights, a state must establish by clear and convincing evidence that the continued relationship would be harmful to the child. *Santosky v. Kramer*, 455 U.S.745, 102 S.Ct. 1388 (1982). Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possess a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g., Santosky v. Kramer, supra*; *D.Y.F.S. v. A.W.*, 103 N.J. 591 (1986); *see also Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 1985 (1983). As grounds for termination of the rights of J.M., *Roe* conflicts with the termination analysis. Only J.M. sought to protect the best interests of the child, while the mother and the state sought to harm the child.

A second inquiry is whether a parent has a constitutionally pro-

tected relationship with the child in the first instance. Here too, the welfare of the child is a critical factor. Generally, both parents enjoy a fundamental constitutional right to companionship with their children, and children enjoy a corresponding right to association with both parents. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388 (1982). A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, 405 U.S. 645 (1972). A natural father has not always been recognized as a parent who enjoys such a constitutional right of companionship. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 109 S.Ct. 2333 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right as "fundamental" and when his rights are a "substantial interest":

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, 97 S.Ct. 2094, 2119 (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except

the appellant. *Quilloin*, 434 U.S. at 255.

This statement explains the difference in treatment of father's rights in *Lehr v. Robertson, supra*, (where the fundamental right of a mother to companionship of her child whom she carried was greater than that of the father who never established a relationship with the child), as well as *Michael H., supra,* (where a California statute was upheld against the challenge by a biological father of a child born to a married woman where she and her husband sought to preserve their relationship with the child). In *Quilloin*, *Lehr* and *Michael H.*, however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a father's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

2.

Casey, in an effort to salvage *Roe*, holds that all fathers' rights may be destroyed to accommodate abortion. To reach that result the Court confuses two separate rights of the mother and ignores the real right of the father. A father's rights are for the companionship, care, custody and management of his children and are

entitled to constitutional "protection". *Stanley*, 405 U.S. at 650. *Casey* only examines the question of whether a father may require his "consent" for abortion. *Casey*, at 54-57. This misses the point. A father *never* has a right or interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and his relationship with the child, never in taking the child's life. *Casey* seems to recognize that the father possesses rights prior to the birth of the child.[5] But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights. *Roe*, therefore, has created a right to kill a child and *Casey*, building upon *Roe*, recognizes this right as greater than a parent's right to protect the child. A part of the problem is *Casey's* confusing two separate rights of the mother: her own right to companionship with her child, and her *Griswold* privacy rights. Her right to

[5] When the issue first came up in the context of abortion, five Justices of the Supreme Court recognized the constitutional right of the father vested in him prior to birth. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). In Dissent, Justices White, Rehnquist and Chief Justice Burger recognized the right of the father to companionship of his children, and found that the balancing of the interests weighed in favor of the father's rights. 420 U.S. at 92, 93 (1976). The same right was recognized by Justices Stewart and Powell in a concurring opinion, finding that the balancing tipped in favor of the mother's rights. 428 U.S. at 89-91.

companionship exists even during pregnancy. C.f. *Lehr, supra*. The state could not demand she destroy the child once conceived or act to take the child away from her inconsistent with Due Process. But this right, like that of the father's, is only to preserve the life of the child and her relationship. This is the right that *Casey* compares with the father's and finds "equal" after birth. *Casey*, at 54. Once the child exists, it is impossible that her companionship interest is that which entitles her to terminate the father's rights and those of the child.

The fact that the mother is the parent who carries the child has always been considered relevant to her rights following birth when she is competing for custody with the natural father. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. That distinction is also recognized in New Jersey law which extends to the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *In The Matter Of Baby M*, 109 N.J. 396, 462, 463 (1988). Therefore, the "inescapable biological fact" that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill

the child is contrary to constitutional principles dealing with termination rights. The fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights and giving sole custody to the father. The privacy right to preserve the child cannot co-exist with the right to kill the child. They are repugnant.

The detrimental consequence of *Casey*, building upon *Roe*, is that it will now be understood that a father possesses no real constitutional rights prior to birth. Such an understanding is at odds with precedent for analysis of a parent's personal liberty rights, and those of the child. *See Santosky, supra. Roe* is also responsible for the cruel development of the law and human conduct in the context of surrogacy arrangements. No sperm or egg donor would have a constitutionally protected interest prior to birth. Consequently childbirth may be achieved through surrogates, genetically unrelated to a child, who, for any reason -no matter how cruel- could threaten to, and terminate the life of the child through abortion. (Consider such a threat in the context of *Anna J. v. Mark C.*, 386 Cal. Rptr. 369 (1991)). *Roe* has already changed the law from one which protects children to one which protects adults who play with the lives of children.

Casey adds a corollary: even if *Roe* was wrongly decided, it does not cause harm. This suggestion ignores the reality that the unborn child is a human being. *Roe* has devastating effects upon children who die during abortion, as well as those who survive it. Prior to *Roe* the New Jersey Supreme Court recognized that the unborn child was a separate person and that the child's life begins at conception. *Smith v. Brennan*, 31 N.J. 353, 362-364, 157 A.2d 497 (1960); *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 422 N.J. 421, 201 A.2d 537 (1964).[6]

[6] *Smith v. Brennan*, and *Raleigh Fitkin* reflected New Jersey's strong policy for protecting life over its destruction. *Smith*, 31 N.J. at 364; *Raleigh Fitkin*, 422 N.J. at 423, 424. This policy, prior to *Roe*, resulted in protection of children from the harm and pain of abortions. *See* N.J.S.A. 2A:87-1. (To perform an abortion was a high misdemeanor which brought a penalty of fifteen years of incarceration. *See New Jersey v. Novak*, 22 N.J. 231, 121 A.2d 5 21 (1956); *New Jersey v. Sicilano*, 21 N.J. 249, 117 A.2d 490 (1956)). In refusing to recognize a tort action for the so called wrongful birth claims the New Jersey Supreme Court eloquently explained the public policy of New Jersey against abortion:

> "It is basic to the human condition to seek life and hold on to it however, heavily burdened. ... the right to life is inalienable in our society. ... we are not faced here with the necessity of balancing a mother's life against that of a child. The sanctity of a single human life is the decisive factor ... (that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged determinants cannot stand against the preciousness of a single human life ..." *Gleitman v. Cosgrove*, 449 N.J. 22, 30, 31, 227 A.2d 689 (1967).

Roe required New Jersey to abandon the policy of protecting life. In 1979, even when *Roe* compelled New Jersey to recognize the wrongful birth cause of action, its Supreme court noted:

> One of the most deeply held beliefs of our society is that life ... is more precious than nonlife (citation omitted) ... concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the *sanctity of*

The harm created by *Roe* is quite evident when the Court recognizes that the unborn child is a human being. Law that was carefully developed to protect innocent lives was swept away because the Court refused to acknowledge that these were persons in fact. For the children who are not aborted, *Roe* is often cruel. New Jersey now feels compelled to tell children that doctors who fail to inform their parents that the child may be born with a handicap, must pay large sums of money to their parents because their parents lost an opportunity to terminate their lives. *See Berman v. Allan, 80 N.J. 420 (1979)*; *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984).

B. *ROE*, AND *CASEY*, BUILDING UPON *ROE*, ARE AT ODDS WITH THE PRECEDENT FOR ANALYSIS OF OTHER INDIVIDUAL RIGHTS: THE RIGHT TO EQUAL PROTECTION OF THE LAWS, THE RIGHT TO PROCREATION, AND THE RIGHT OF PARENTS TO DISCHARGE THEIR DUTIES TO THEIR CHILDREN.

Roe conflicts with other precedent for the analysis of individual liberties: the right to equal protection of the law, the right to pro-

> *life*. The federal constitution characterizes *life as one of the three fundamental rights* of which no one can be deprived without due process of law ... our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. CONST. (1947), ART. I, SEC. I. The declaration of independence states that the primacy of man's 'unalienable' right to life is a 'self-evident truth'. Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped human beings. *Berman v. Allan*, 80 N.J. 420, 429 (1979).

create, and the right of parents to discharge their duties to their children.

1. EQUAL PROTECTION.

Building on *Roe*, *Casey* found that although a father's constitutional rights and those of a mother are "equal" after birth, the mother's are greater before birth. *Casey*, at 54. This may be the consequence of *Roe*, but it is drastically in conflict with precedent dealing with the equal protection of the laws.[7] *See Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976); *Califano v. Goldfarb*, 430 U.S. 199, 97 S.Ct. 1021 (1977); *Califano v. Webster*, 430 U.S. 313, 97 S.Ct. 1192 (1977) (gender based classifications require at least an intermediate level of scrutiny; strict scrutiny if there is a denial of a fundamental right[8]).

Equal protection requires a balancing of the rights of a father who seeks to protect the child, and the mother's privacy interest in avoiding the stress of raising children. Where a mother's life is not at stake and she was not denied her *Griswold* rights there is no valid distinction between a father's rights concerning the life of his

[7] *See* Appendix of J.M., individually, Volume II at 130 to 143.

[8] *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

child and that of a mother. The interests of a woman identified by the *Roe* Court to support the mother's justification for an abortion apply equally to a father (the stress in rearing a child and stigma associated with unwed parents). *Roe*, 410 U.S. at 153. The fact that the mother carried the child does not bear upon a right to terminate the life of the child. Rather, it bears upon questions relating to what is in the interest of the mother and her child following birth. That is because the carrying of the child directly relates to bonding, which affects the health of both the child and the mother. It bears no relationship to the question of whether a father and child preserve their relationship. That an unborn child relies upon its mother for nourishment is not unique. Indeed, that fact creates obligations to the child, not exonerations. Even doctors, unrelated to a child, have legal obligations not to harm a child within a mother's womb. *Smith v. Brennan*, 31 N.J. 353 (1960).

Under the New Jersey parentage act N.J.S.A. 9:17-40 et seq. the obligations of J.M. are derived from the fact of conception alone. The birth is the natural consequence of the conception. His duties as a father under the law, which includes support, is derived from the fact of conception. He has no right to demand an abortion, nor should he. His embarrassment, hardship, or distress that

flows from an unplanned pregnancy, whether he is prepared to rear or support the child, is irrelevant to whether society should extend him the "right" to take the child's life.

However, where the right he seeks to enforce is one consistent with the child's best interest, the same statute that imposes obligations upon him based upon the single act of conception, extends to him the right to affirmatively choose to discharge his obligations through custody or visitation and support. Likewise, under the adoption statues, a judgment of adoption cannot be entered against the natural father over his objection, unless there is a specific finding of abandonment or neglect. N.J.S.A. 9:3-46. The right of a natural father who is not married to the mother is based solely upon his status as genetic father. *See In re Adoption of a Child by J.R.D.*, 246 N.J. Super. 619 (Ch.Div.1990).

The issue can be framed in different ways. *Casey* may choose to frame the issue as a father blocking the mother's right to take the life of her own child.[9] More to the point is that what V.C. propos-

[9] It is not the recognition of the rights of a father to protect his child which is a potential source of dishonoring in a marriage. It is the fact the Court created a right of abortion. A father could physically abuse a mother because the father *doesn't want* a child, and thereby force abortion against a mother's wishes. This seems a far greater harm.

es is that the father's enjoyment of the benefits of his relationship with his child, his fundamental constitutional rights, can be entrusted to another who could arbitrarily destroy a relationship with his child for any reason, whether it be benevolent or cruel.

If any fundamental constitutional right of the father is implicated, then the creation of a classification extending exclusive decision making power to the mother violates due process, because there would be no compelling interest of the State.[10] If his constitutional rights are not fundamental, the classification created is gender based, requiring intermediate scrutiny. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d. 397 (1976). As a result, the State classification must serve important governmental objectives and must be substantially related to the achievement of the objectives. The objective here is to protect the right of the mother to participate in making decisions about whether she should have children. *See Roe*, 410 U.S. at 153. That objective is already served. Once the mother conceives, she already has a child. Where one parent or the other is willing to raise the child or take responsibility for the child, the inconvenience of raising the child is not a consideration.

[10] See footnote 9, p. 14 above.

Gender certainly does not relate to the question. Considerations about the inconvenience of carrying the child, unique to the mother, are not implicated. They are relevant only prior to conception concerning the decision of whether a woman should become pregnant or not. Once she is pregnant and another human being is in existence, the considerations are quite different. The inconvenience of the mother in carrying the child is never a real consideration. That is reflected in the fact that even under *Roe* the State has a compelling interest in protecting the life of a child in the third trimester when pregnancy is most inconvenient to a mother and when she is subjected to the greatest pain (at childbirth). Therefore, gender is not a legitimate distinction that relates to the State's objectives concerning the question of whether a child should live or not,[11] and bears no legitimate relationship to the state's objective to allow couples to avoid pregnancy.

2. <u>THE RIGHT TO PROCREATE AND THE FATHER'S RIGHT TO DISCHARGE HIS OBLIGATION TO HIS CHILD.</u>

Casey states that *Roe* is not in conflict with *Skinner v. Oklahoma*,

[11] Parental rights derived under New Jersey law and the Federal Constitution always relate to the child's best interest. *Fantony v. Fantony*, 21 N.J. 525, 536 (1956). This is even true where conception is the result of artificial insemination under a contract that is unenforceable and void *ab initio*. *Baby M*, 109 N.J. 396 (1988). In actuality, when a father chooses to preserve the life of the child, he is exercising his parental right to do what is in the child's best interest.

316 U.S. 535 (1942), which recognized a fundamental constitutional right to procreate. That may be true of the right of V.C., but certainly not of J.M. A man's fundamental right to procreate reocgnized by *Skinner* would be meaningless, if once conception takes place all of the father's efforts to see that his child is born are frustrated by the mother, with assistance of the state. "The right to procreate very simply is the right to have natural children." *Baby M*, 109 N.J. at 448. The right to procreate cannot be equated with the right to conceive, otherwise the purpose of the right would be undermined:"...procreation (is) fundamental to the very existence and survival of the race." *Skinner,* 316 U.S. at 541.

As both law and nature impose upon J.M. obligations to his child based upon the fact of conception, there must be a concurrent right to discharge these obligations. It is recognized that a parent has a right to protect, care for, nurture, and educate his offspring. *See Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925). In nature, what higher law is there than that of a parent to protect the life of his own child?

C. <u>*ROE* IS AT ODDS WITH PRECEDENT FOR THE DEVELOPMENT OF PERSONAL LIBERTIES IF A STATE CAN BE RECOGNIZED AS HAVING A RIGHT WHICH IS NOT PERSONALIZED IN THE INDIVIDUAL THE STATE SEEKS TO PROTECT.</u>

The greatest threat to all individual liberties may well be the holding of *Roe* that the State has the power to protect a child (following viability) yet the child has no right from which the State's power is derived or with which it coexists. The State, therefore, has the power to protect a man's child, but he himself does not. Such a notion, if permitted to stand, is inconsistent with American concepts of the essence of government itself, the Declaration of Independence declaring that governments are instituted to secure the rights of individuals (individuals do not exist for government). It is also inconsistent with the law which reflects that the power of the State to protect the child rests in its *parens patriae* jurisdiction. *See Santosky*, 455 U.S. at 766, 102 S.Ct. at 1401; *C.f. Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265 (1982); *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975); *Raleigh Fitkin supra*; *see also* Petition of J.M., Individually at 61, 62.

POINT II

ONCE THE COURT RECOGNIZES THAT THE UNBORN CHILD IS A PERSON, RELIANCE IS NOT A DOCTRINE WHICH WOULD OPERATE AS A BAR TO OVERRULING *ROE*, AND *ROE* IS THUS SEEN AS BEING UNWORKABLE.

Casey found that reliance is a bar to overruling *Roe*. *Casey*, at 14. J.M. suggests that for reliance to be a true bar to overruling

any case it must be of the type referred to in *Payne v. Tennessee*, 501 U.S. ___ (1991): the particular conduct engaged in by those who rely upon a specific holding poses no harm to others. *See Casey*, at 12-13. But if the conduct which is performed as a result of the "reliance" is harmful to others, then the fact that the decision encourages the conduct is actually a reason to overrule the decision, not perpetuate the harm. *Casey* ignores the nature of the conduct. Once it is recognized that the life of a child is being taken, the fact that one relied upon an erroneous Supreme Court decision is no basis to perpetuate the cruel conduct of killing children (especially when they experience pain). The reliance argument also ignores the fact that conception may be intentional.

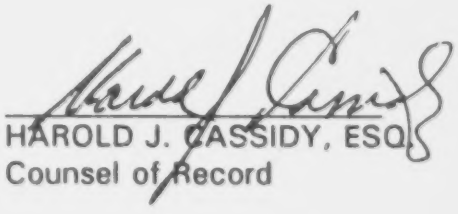
Another question is thus posed: does one have a right to abortion because one has a right to enter into irresponsible and immature sexual conduct? Or does one have a right to enter into irresponsible conduct because one has this right to an abortion? If it is the latter, it is almost as though one has to be permitted the irresponsible conduct, even if it is unnecessary to preserve the true privacy interest. This is because the privacy interest has been viewed as an all encompassing "right to an abortion" without any relation to the real underlying interest. If the former, then the right is one of

enjoying irresponsible conduct without concurrent obligations.

When it is recognized that the unborn child is a person in fact, the unworkable nature of *Roe* is apparent. No rule of law that permits one person to take the life of another with impunity will go ignored by people of conscious and the rule of law will engender no respect. Law unworthy of respect is inherently unworkable. That the *Roe* Court justified its decision because mankind could not determine when the life of a person began, is at odds with current science and medicine.

CONCLUSION

"Man's" current knowledge not only justifies, but requires, that the Court now overrule that portion of *Roe* which found that the unborn child was not a person and did not enjoy constitutional rights.



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Supreme Court, U.S.
FILED
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No. 91-2034

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J.M., individually

Petitioner,

-against-

V.C.,

Respondent.

REPLY BRIEF SUBMITTED BY J.M., INDIVIDUALLY

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STATEMENT OF THE CASE

Subsequent to J.M. filing the Petition for Writ of Certiorari in the United States Supreme Court and V.C.'s response, V.C. filed a motion in the Appellate Division of the Superior Court of New Jersey seeking Summary Affirmance of the appeal on J.M.'s individual case. Despite V.C.'s arguments to the United States Supreme Court that the New Jersey Supreme Court's order of March 24, 1992 in J.M.'s individual case is not final[1] she argues to the Appellate Division that that Court is required to summarily affirm the Dismissal of J.M.'s individual claim because the March 24, 1992 Order of the New Jersey Supreme Court disposed of the case on the merits. In a brief submitted to the Appellate Division in support of a motion for "required" summary affirmance, V.C. argued that:

> Plaintiff's appeal asks this Court to contravene the decision of the New Jersey Supreme Court in this case.[2]

ARGUMENT

POINT I

UNDER THE FACTS OF THIS CASE, THE MARCH 24, 1992 ORDER OF THE NEW JERSEY SUPREME COURT IS FINAL WITHIN THE MEANING OF 28 USCA §1257(a).

Respondent V.C. contends that the March 24, 1992 Order of

[1] See, Res. Br. at 2 to 6.

[2] Paragraph one of Point II of V.C.'s brief is reproduced and found as Exhibit 2 in the Appendix to this Brief, at 7a.

the New Jersey Supreme Court is not "final" within the meaning of 28 USCA §1257(a) because, technically, proceedings are pending in the Appellate Division of the Superior Court of New Jersey (Resp. Br. p. 2-6). Respondent addresses this argument to J.M. in his individual capacity only, conceding that the Order of the New Jersey Supreme Court is final as to the child.

While making this argument before this Court, V.C. simultaneously advances an inconsistent argument before the Appellate Division in New Jersey. There V.C. argues that the Order of March 24, 1992 of the New Jersey Supreme Court precludes the Appellate Division from exercising an independent review of the trial court's dismissal of J.M.'s complaint brought in his individual capacity. In her brief filed on August 4, 1992 in the Appellate Division, V.C. argues that a substantive review of J.M.'s individual appeal would "contravene the decision of the New Jersey Supreme Court in this case," and the appeal is a "flagrant" request to "violate" the ruling of the New Jersey Supreme Court of March 24, 1992 (see Resp. Br., App. Div. at p. 11, reproduced in Appendix attached at 7a).

The procedural quirk which, on the face of it, requires J.M. to move through the New Jersey courts as a prerequisite to filing a

Petition for Writ of Certiorari under 28 USCA §1257(a) is the type of futile exercise which the United States Supreme Court has ruled is not required before that Court can review an Order on a Writ of Certiorari. *Mills v. State of Alabama*, 384 U.S. 214, 86 S.Ct. 1434 (1966); (where proceedings in lower state courts are "preordained"); see *Pope v. Atlantic Coastline R.Co.*, 345 U.S. 379, 73 S.Ct. 749 (1953); *North Dakota St. Bd. of Pharm. v. Snyder's Drug Store, Inc.*, 414 U.S. 156, 94 S.Ct. 407 (1973); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 97 S.Ct. 1782 (1977).

Although J.M. was compelled to file a Notice of Appeal in the Appellate Division to insure that he would at least obtain one opportunity to have a petition reviewed, the New Jersey Supreme Court clearly considers itself powerless to review the merits of the issues presented in this case because they are federal constitutional questions that only the United States Supreme Court can resolve. The New Jersey Supreme Court stated:

> ... the Court having concluded that under current law, plaintiff's proffer of proofs would not realistically assist or inform the Court in its determination of legal issues properly before it ... .[3]

In *Mills, supra*, the United States Supreme Court, in holding that

[3] Appendix Volume I at 106.

an order of the Alabama Supreme Court was "final" for purposes of §1257(a), despite a remand of the matter to a lower court, explained:

> Thus, if the case goes back to the trial court, the trial, so far as this record shows, will be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of *Mills'* constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a round-about process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in a judicial systems already troubled by delays ... . *Mills*, 384 U.S. at 217, 86 S.Ct. at 1436.

That is precisely the situation in the present case. The New Jersey Supreme Court has already stated that facts are irrelevant to the legal inquiry and has resolved the legal issues in favor of V.C. V.C. suggests that J.M. must have the Appellate Division "summarily affirm" the lower courts decision (not being permitted a true review of the merits) and then have the Supreme Court do the same before the matter can be reviewed by the United States Supreme Court under §1257(a). The line of cases cited, such as *Mills*, speak to this very exception and treat the Order of March 24, 1992 as final. The procedure suggested by V.C. is "mechanical" (*Abood, supra*), an economic waste and delay of justice (*North*

Dakota, supra), and the later judgment of the New Jersey courts is "preordained" (*Mills, supra*). V.C.'s argument is particularly offensive to the legal concepts involved because of the fact that the child's case is concededly before the United States Supreme Court under 28 USCA §1257(a). For the purposes of judicial thoroughness, elimination of judicial waste in the interests of justice, the Court must be free to take the entire case if it so chooses.

POINT II

THE ORDER OF THE NEW JERSEY SUPREME COURT WHICH PERMITTED THE TAKING OF THE CHILD'S LIFE AND FAILED TO ENFORCE THE CONSTITUTIONAL RIGHTS OF THE CHILD AND J.M., INDIVIDUALLY, CONSTITUTES STATE ACTION.

V.C. argues that, because she is a private citizen, the Order of the New Jersey Supreme Court did not constitute state action (Resp. Br. at 8-9).[4]

It is axiomatic that for conduct to be violative of the constitution there must be some form of state action. *Shelly v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948); *NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 454 (1988). Where conduct of a private citizen is involved, a court order, in some instances, may itself constitute a

[4] V.C. raises this contention for the first time in the United States Supreme Court, having failed to raise it in the State Court before J.M. filed the petitions. Nonetheless, J.M. responds to this argument.

direct act of the state. e.g. *Shelly, supra*. State involvement in the private conduct also constitutes state action. e.g. *North Georgia Finishing, Inc. v. Di-Chem Inc.*, 419 U.S. 601, 95 S.Ct. 719 (1975). In *Tarkanian* the majority framed the general inquiry concerning state action thusly:

> In the typical case raising a state action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the state was sufficiently involved to treat that decisive conduct as state action. 488 U.S. at 192, 109 S.Ct. at 462.

The court listed three general categories of state involvement in private conduct which constituted "state action": [1] where the state creates the legal framework governing the conduct; [2] where the state delegates its authority to the private sector; and [3] where the state knowingly accepts the benefits derived from unconstitutional behavior. *Tarkanian*, 488 U.S. at 192, 109 S.Ct. at 462.

Here the acts which harmed the plaintiff constitute state action on two separate levels: first, the order of the New Jersey Supreme Court itself was a direct act of the State which caused the harm, and second, the act of the abortion itself, performed by doctors, nurses and submitted to by the defendant was accomplished only with an impermissible level of involvement of the state

and was sufficient to constitute state action.

A.

Under certain conditions the issuance of a court order itself constitutes a direct act of the state, and is not merely an impermissible involvement of the state in what is otherwise private conduct. e.g. *Shelly v. Kraemer*, 334 U.S. 1, 58 S.Ct. 836 (1948) (an injunction issuing from a court is an affirmative act of the judicial branch of government); *New York Times v. Sullivan*, 376 U.S. 354, 84 S.Ct. 710 (1964) (an order enforcing a state created cause of action which impairs a constitutional right). As early as 1880 the United States Supreme Court, in *Virginia V. Rives*, 100 U.S. 313 (1880) noted "denials of equal rights in the action of judicial tribunals of the state are left to the revisory powers of this Court." 100 U.S. at 322; see also *ex parte Virginia*, 100 U.S. 339, 347 (1880); *Civil Rights Case*, 109 U.S. 3 (1883).

The United States Supreme Court observed in *Sullivan, supra*:

> Although this is a civil law suit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms ... It matters not that that law has been applied in a civil action and that it is common law only ... The test is not the form in which state power has been applied, but, whatever the form, whether such power has in fact been exercised. *Id.* at 265.

Not every dispute between two private citizens results in state action simply because a state court has issued an order. However, as in *Sullivan*, the state court's application of a rule of law which imposes restrictions upon an individual's constitutional rights constitutes state action.

Under normal circumstances, the state may be under no obligation to act to prevent private conduct. There are, however, instances where it is the unique function of government to act. In some instances, the state's affirmative duty to act must be performed through its courts. As in *Sullivan*, one function of State courts is to enforce Federal Constitution Rights, and therefore, any state cause of action the Court seeks to enforce must reflect the Constitutional Rights of the litigants. It seems rather elementary that when a state attempts to enforce constitutional rights through its courts, as the New Jersey Courts did here (ruling V.C. had rights, but the child and J.M. did not) that the rulings constitute "state action" subject to the review of the U.S. Supreme Court. The state creates the rules by which disputes over the future of children are decided. So, too, it is the unique function of government to affirmatively provide protection to the life and safety of its citizens, especially children. No private organization

provides such services, the state specifically reserving the power to itself. When a citizen, therefore, seeks a court order to protect life, there is no where else for him to go, and the state has an affirmative obligation to intervene. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964). It is the affirmative duty of the State to protect children. 43 C.J.S. Infants, Sec. 5 at 67 (1978); see *D.Y.F.S. v. A.W.*, 103 N.J. 591, 512 A.2d 593 (1986); *Johnson v. State*, 18 N.J. 422, 430 (1955), Cert. Den. 355 U.S. 942.

We note four facts present in this case which support the conclusion that the order of the New Jersey Supreme Court constituted direct state action.

First, the trial court entered an injunction. The issuance of an injunction clearly constitutes state action. *Shelly v. Kraemer, supra.* Once a state does take action, it must do so without violating the constitutional rights of the litigants. When the New Jersey Supreme Court issued its order, in vacating the injunction of the lower court it clearly implicated the state in the conduct of V.C. Its order brought the painful death of the child under the sanction of the law. The Supreme Court, before reviewing the Court order enjoining the abortion, was therefore required to

consider the rights of the child and father, and its order was the equivalent to those in *Shelly* and *Sullivan*.

Second, the very life of the child was at stake. Unlike other rights, no redress of grievance could compensate for the impending loss. The Right to Live is unique and the state as the protector of life and public safety had a unique and affirmative duty to protect life when requested. *Raleigh-Fitkin, supra*, 42 N.J. at 423. In *Raleigh-Fitkin*, the New Jersey Supreme Court specifically found this obligation, stating: "We are satisfied that the unborn child is entitled to the law's protection ..." 42 N.J. at 423, 201 A.2d 537. This duty is especially stringent when a court is being asked to remove an injunction - a state act which gave official sanction to the private conduct. By removing the injunction, the state surely placed its imprimatur on the act of taking the life of this child. C.f., *Blum v. Yartesky*, 457 U.S. 991, 102 S.Ct. 2777, 2785 (1982).

Third, the act of the private citizen had not yet taken place and could only take place after the state acted. This distinguishes those cases where grievance is redressed after a private citizen has already acted and the state had no real involvement.

Fourth, this case does not involve a private entity which sets general policy in a private matter. This case involves a specific,

real and present danger to the plaintiff only. Petitioning the court is the only way J.M. could peacefully protect his child. Surely, V.C. does not suggest that J.M. must use force on V.C. and be arrested (in order to have "state action") before he can raise the rights of his child and those of his own. The only effective means to preserve the life of the child, the child's rights, and those of J.M. was to petition the court.

If V.C.'s argument is accepted then the constitution would not require New Jersey Courts to give her assistance in instances where J.M. or anyone else, had planned to kill her. Even when a killer waited outside the courtroom, with a loaded rifle, the court would not be required to enjoin his act because the impending, announced and planned murder would not constitute "state action" and her constitutional right to live and live in safety was "not implicated." She would be sent from the courtroom to the fate awaiting her outside.

Finally, the Court, in acting to determine the common law rights of the two parents and the child, where the parents disagreed on the future of the child, exercised and was required to exercise its *parens patriae* jurisdiction. In doing so it was required to apply the equal protection of the law to all parties. *Jersey Shore Medical*

Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143-145 (1980).

The New Jersey Supreme Court, in *Jersey Shore* has stated:

> The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265,84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' *Shelly v. Kraemer*, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment." *Jersey Shore v. Estate of Baum*, 84 N.J. at 144, 145.

New Jersey, therefore, was obligated to provide equal application of the child's Fourteenth Amendment Rights (and those of J.M. individually) as well as the State's own constitutional right to life and right to defend life. N.J. Const. Art. I, Sec. 1.[5]

[5] The New Jersey Supreme Court has found that the right to life is inalienable. *Gleitzman v. Cosgrove*, 49 N.J. 22, 30, 227 A.2d 689 (1967). Art. I, Sec. I specifically establishes a Right to Defend Life and a Right to Life itself. New

B.

Even if the order of the New Jersey Supreme Court was not a direct act of the state (which it was), it constituted impermissible state involvement, for all of the reasons set forth under section A above, in the private conduct of V.C., her doctor, and medical assistants because the state created the legal framework which governed her conduct. See *Tarkanian, 488 U.S. at 192, 109 S.Ct. at 462*. New Jersey applied its law as well as what it perceived to be the Federal Constitutional law.

In 1978 New Jersey Repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor. In doing so it removed all prohibition against a mother taking the life of her child. New Jersey has given a cause of action to parents where doctors fail to advise them that their unborn child may be born diseased, so that the mother can have an abortion. *Berman v. Allen*, 404 A.2d 8 (1979). New Jersey has created a constitutional right to funding of "therapeutic abortions." *Right to Choose v. Byrne*, 450 A.2d 925 (1982). New Jersey, in licensing its physicians, specifically gave them license to

Jersey has found, although it is currently subject to *Roe*, that an unborn child has a right to live. *Hummel v. Reiss*, 129 N.J. 118, at __, 608 A.2d 1341, at __, July 21, 1992.

terminate the life of a child before birth. New Jersey licenses and regulates doctors and hospitals through the Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (Termination of Pregnancy)[6]

The regulations of the doctors specifically and affirmatively authorize abortions anytime prior to birth. Even after 20 weeks gestation the only limitations placed upon the abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure (always fatal to the child)[7] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g). The physician must, in order to obtain such permission, show he or she has the proper training.

The state has created rules by which it literally licenses individuals to take the life of a child anytime prior to actual birth. This specific licensing and regulation, together with repeal of all prohibitions against abortion, constitutes the creation of rules of a

[6] The state administrative code governing the Board of Medical Examiners as it pertains to termination of pregnancy is reproduced as Exhibit 3 of the Appendix to this brief.

[7] See, *Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483, 103 S.Ct. 2517, 2521.

legal framework for the conduct. Without it, the abortion of J.M.'s child would not have taken place.

The licensing procedure to authorize specific individuals to take the life of the child itself creates this framework. This licensing procedure can be distinguished from those found in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) and *Jackson v. Met. Ed. Co.*, 419 U.S. 345, 95 S.Ct. 449 (1974) in two separate ways. First, the license in *Moose Lodge* and *Jackson* were collateral to the actual conduct complained of. Here, the state specifically and affirmatively licenses doctors and hospitals to perform the precise act resulting in the harm. Second, in *Moose Lodge* and *Jackson*, though the state had the power to license, the private actors performed functions that were outside the functions of the state. Here, it is the specific function of the state to protect the lives of its citizens. It reserves that role to itself. The state, therefore, in giving express authorization to doctors and hospitals to take the lives of children is involved in activity which is within the unique function of the state. To expressly authorize the taking of life when the state has a duty to protect that life implicates the state in the conduct of the private actors.

POINT III

BECAUSE THE CHILD IS IN FACT A PERSON PRIOR TO BIRTH, THE FOURTEENTH AMENDMENT MUST BE CONSTRUED TO PROVIDE THE CHILD PROTECTION UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

V.C. purports to see no relevance to the scientific facts that: (1) the life of a person begins at conception; and (2) soon after conception, and long before birth, a child feels pain during an abortion. V.C. relies upon the *Roe* Court finding that there is no specific or implied reference in the text of the Constitution to the status of the child, before birth, as a member of a class of persons who enjoyed constitutional rights [Resp. Brf. at 21-26]. However, if the Court conducts a reexamination of this question, it must conclude that a child enjoys rights under the Fourteenth Amendment even prior to birth.

A.

Despite statements by V.C. to the contrary, this Court has expressly examined the legal question of whether a person enjoys rights under the Fourteenth Amendment, prior to birth, only once, in *Roe v. Wade*, 410 U.S. at 156-162, 93 S.Ct. at 728-731 (Section IX)(See Pet. p. 22-29). This attempt was impaired because that Court was unable to reach a conclusion on the

factual components of the inquiry. The Court asserted that, at that particular point in "man's knowledge" (1973), the Court was unable to determine when life begins.

Roe therefore denies what is now known to be a basic truth: the life of every individual human person begins at conception. In addition, a child experiences pain very early in development and abortion causes a painful, brutal death of a child. *Roe* and its progeny is based upon a false assumption concerning the most important and central fact of the legal analysis. As a result, *Roe* and all subsequent cases have never analyzed the constitutional question with the understanding that the child is, in fact, a human being who experiences pain prior to birth. These two facts require a totally different legal analysis than the one provided in *Roe*.

B.

Once these facts are established, the inquiry becomes quite different; it no longer is appropriate to examine the use of the word "person" in the text of a clause for qualifications to hold public office (see Pet. p. 22-29). The question becomes what is perhaps the most profound in all of Constitutional jurisprudence: Is the Supreme Court of the United States free to exclude from protection of the Fourteenth Amendment any specific class of per-

sons legally within the borders of the nation? Is it an inherent contradiction for the Court to hold that the Equal Protection Clause guarantees equal application of the law while excluding its benefits to any class of persons? (see Pet. p. 22-29) Is the right of any individual to live dependent upon the subjective judgments of others concerning the intrinsic value of that life, or do all individuals enjoy that right independent of the subjective beliefs of others? It includes other inquiries which strike at the core of the function of the Court and government itself. What are the proper criteria for the Court to use in answering the ultimate issue? Did *Roe* use the proper criteria? In the absence of a precise definition of "person" anywhere in the text of the Constitution, what principles should the Court employ?

The inquiry also requires an examination of the function of government. Does the fact that states reserve to themselves the police power to protect life and provide safety create a duty to provide protection before the harm is caused where the state has an opportunity to do so?[8]

[8] We speak here of general rules of application, and the state's obligation to refrain from creation of rules which authorize the taking of life. We distinguish this obligation of the state from instances where individuals would seek to create a civil cause of action following individual private acts. See, e.g. *DeShaney v.*

This inquiry includes the question concerning the consequences of the recognition of the child's rights. It would seem to clearly require the state to refrain from authorizing or assisting in the taking of the child's life. The State could not license doctors and hospitals and extend the authority to perform prohibited abortions. It may also mean that the States would be given considerable discretion in the manner they choose to protect the child's rights.[9]

C.

The joint opinion in *Casey v. Planned Parenthood of S.E. Pa.* expressed concern that when *Roe* is overruled, the Court must provide a valid explanation. That is a proper concern. But now the Court can and should take cognizance of the fact that the child is a helpless human being capable of experiencing pain, and the most dependent upon the great rights enumerated in our Constitution. The Court should review the rights of the child, find the truth and build an analysis on the facts which are real. When the Court recognizes the rights of the child because present science can provide the answers it now does, the American public will accept

Winnebago Cty. Dep. of Soc. Sec., ___ U.S. ___, 109 S.Ct. 998 (1989).

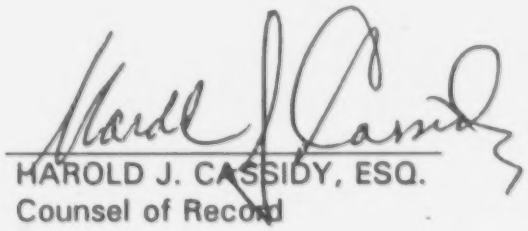
[9] Some states may determine not to create criminal penalties. Some may choose to do so. All must refrain from authorizing the prohibited conduct.

the Courts' decision no more baldly than it did *Brown v. Board of Ed.*, because it is based upon a truth that all can understand as just: this is a child who experiences pain.

CONCLUSION

The newly available scientific information which establishes that the life of every human being begins at conception, and the child is capable of experiencing pain in the early stages of pregnancy, require that the Court reexamine the question of whether the child has rights prior to birth. The fact that the child is, in fact, in existence prior to birth, implicates the individual rights of J.M.

The Court should grant Certiorari in this case.



HAROLD J. CASSIDY, ESQ.
Counsel of Record

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APPENDIX
EXHIBIT 1
CORRECTED ORDER TO SHOW CAUSE
WITH TEMPORARY RESTRAINTS
ENTERED: MARCH 9, 1992

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JM, individually as guardian ad litem of his unborn child Plaintiff, vs. VC; WMC; JOSEPH BLOW RICHARD ROE, fictitious names of real individuals who are employees and agents of the defendant corporation Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION MONMOUTH COUNTY DOCKET NO. CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

THIS MATTER having been opened to the Court by Cassidy, Foss & San Filippo, Harold J. Cassidy, Esq., appearing, and Patrick

J. Mullaney, Esq., attorneys for the Plaintiff, and the Court having reviewed the Plaintiff's Verified Complaint, the Certifications, the sworn testimony presented, Plaintiff's Brief and the arguments of Plaintiff's counsel; and the Court having determined for good cause showing that: (1) it clearly appears from the specific facts shown by the sworn testimony and the Verified Complaint that the Plaintiff is the unwed natural father of an unborn child; that the Defendant, V C [1] is the unwed mother of that unborn child; that the Defendant has been pregnant for approximately eight weeks; that the Defendant V C intends to abort her pregnancy without the consent of the natural father on or about March 11, 1992; that the Plaintiff, the natural father opposes the abortion of the unborn child and wishes to raise and support the child; that the Plaintiff wishes to assert his rights as the natural parent of the child; that the Plaintiff, as the natural parent, wishes to assert the rights of the unborn child; and therefore, that immediate and irreparable harm will result to the Plaintiff; (2) Plaintiff has demonstrated a substantial likelihood of success on the merits; (3) Plaintiff has demonstrated that any harm to the Defendants

[1] The full names of the parties appeared in original. Because the Court so ordered, the names were later dedacted and the initials used in their places.

resulting from the imposition of the temporary restraints requested by Plaintiff is outweighed by the harm which would result to the Plaintiff if such restraints were not imposed; and (4) the imposition of the temporary restraints against the Defendants does not contravene the public interest;

IT IS on this 7th (sic)[2] day of March, 1992 at 3:35 P.M.

ORDERED that Plaintiff's application for a temporary restraining order shall be and hereby is granted as follows:

A. Defendant V C is hereby prohibited and enjoined from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Defendant WMC , Howell, New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will

[2] The order was actually signed at 3:35 p.m. March 9. The erroneous date of March 7 appears in original.

otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

C. Each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey is hereby prohibited and enjoined from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

IT IS FURTHER ORDERED that on forty-eight (48) hours' notice to Plaintiff's counsel, Defendants may appear and move the dissolution or modification of this Order; and

IT IS FURTHER ORDERED that the restraints imposed by this Order shall expire on the 30th day of March 1992 at 4:00 P.M., unless extended by further order of this Court; and

IT IS FURTHER ORDERED that the defendants are enjoined from disclosing, directly or indirectly, the identity of the plaintiff, John Doe, and the true identity of Jane Roe, and Ordered to take all reasonably precautions to prevent an inadvertent disclosure of them; and

IT IS FURTHER ORDERED that V C is enjoined from leaving the State of New Jersey for the purpose of terminating the life of her unborn child; and

IT IS FURTHER ORDERED that the Defendants or their attorneys show cause before this Court at the Superior Court of New Jersey at the Monmouth County Court House in Freehold, New Jersey, on March 30, 1992, at 1:30 o'clock P.M., why an Order should not be entered:

A. Permanently prohibiting and enjoining Defendant V C from accepting or requesting any service, any surgical or medical procedure, ingesting drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of her pregnancy or which will otherwise, directly or indirectly, result in the termination of her pregnancy;

B. Permanently prohibiting and enjoining Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ;

C. Permanently prohibiting and enjoining each and every director, officer, employee, agent and/or representative of Defendant WMC , New Jersey from rendering any service, performing any surgical or medical procedure, dispensing any drug or substance of any kind or taking any action which will directly or indirectly result in the abortion of the pregnancy of V C or which will otherwise result, directly or indirectly, in the termination of the pregnancy of V C ; and

IT IS FURTHER ORDERED that this order shall not be disclosed or revealed to anyone other than defendants counsel where the names of the parties are visible or revealed; and

IT IS FURTHER ORDERED that Defendants file an Answer to the Plaintiff's Complaint, and submit any briefs and/or certifications or affidavits in opposition to the above relief, not later than March 26, 1992 at 4:00 P.M., and that Plaintiff submit any reply briefs and/or certifications or affidavits not later than March 27, 1992 at 4:00 P.M.

/s/ Patrick J. McGann, Jr.
J.S.C.

EXHIBIT 2
A PORTION OF PAGE 11 OF RESPONDENT V.C.'S BRIEF FILED IN APPELLATE DIVISION OF SUPERIOR COURT OF NEW JERSEY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE FILED AUGUST 7, 1992

II. PLAINTIFF'S APPEAL ASKS THIS COURT TO CONTRAVENE THE DECISION OF THE NEW JERSEY SUPREME COURT IN THIS CASE.

Plaintiff's appeal asks this Court directly to contravene the holding of the New Jersey Supreme Court in this case. When both sides appealed to the New Jersey Supreme Court, that Court not only reversed the TRO imposed on V.C., but over plaintiff's objections summarily dismissed the only remaining portion of plaintiff's complaint, bluntly ruling that plaintiff's factual allegations were irrelevant, and a trial unwarranted, because "plaintiff's proffer to proofs would not realistically assist or inform the court in its consideration of the legal issues properly before it." App. 116a. Thus, as plaintiff himself has correctly noted, the import of the New Jersey Supreme Court's order is that there shall "never" be a trial on the various issues plaintiff has raised in this case. *See* Plaintiff's Supplemental Brief to the New Jersey Supreme Court in Support of Motion for Reconsideration, at 4. Yet, plaintiff's appeal, in asking for a trial in the Chancery Division, asks this Court flagrantly to violate precisely this ruling.

EXHIBIT 3
REGULATION OF THE BOARD OF MEDICAL EXAMINERS OF THE STATE OF NEW JERSEY 13:35-4.2 (TERMINATION OF PREGNANCIES)

13:35-4.2 Termination of Pregnancy

(a) This rule is intended to regulate the quality of medical care offered by licensed physicians for the protection of the public, and is not intended to affect rules of the Department of Health establishing institutional requirements. To the extent that rules of the two agencies may overlap, the Medical Board recognizes and relies upon the regulatory procedures of the Department of Health in establishing minimum acceptable standards for non-physician personnel, equipment and resources, the adequacy of the physical plant of the facility in which surgical procedures shall be performed, and the facility's interrelationship with an adequate network of health care-related resources such as ambulance service, etc.

(b) The termination of a pregnancy at any stage of gestation is a procedure which may be performed only by a physician licensed to practice medicine and surgery in the State of New Jersey.

(c) Provisions of this rule referring to stage of pregnancy shall be in terms of weeks from start of last menstrual period or "weeks LMP." For example, the stage of pregnancy at 12 weeks gestational size, as determined by a physician, is the equivalent of 14 weeks from the first day of the last menstrual period (LMP).

(d) After 14 weeks LMP, any termination procedure other than dilation and evacuation (D & E) shall be performed only in a licensed hospital.

(e) Fifteen weeks through 18 weeks LMP: After 14 weeks LMP and through 18 weeks LMP, a D & E procedure may be performed either in a licensed hospital or in a licensed ambulatory care facility (referred to herein as LACF) authorized to perform surgical procedures by the Department of Health. The physician may perform the procedure in an LACF which shall have a Medical Director who shall chair a Credentials Committee. The Committee

shall grant to operating physicians practice privileges relating to the complexity of the procedure and commensurate with an assessment of the training, experience and skills of each physician for the health, safety and welfare of the public. A list of the privileges of each physician shall contain the effective date of each privilege conferred, shall be reviewed at least biennially, and shall be preserved in the files of the LACF.

(f) Nineteen weeks through 20 weeks LMP: A physician planning to perform a D & E procedure after 18 weeks LMP and through 20 weeks LMP in an LACF shall first file with the Board a certification signed by the Medical Director that the physician meets the eligibility standards set forth in (f)1 through 7 below and shall comply with its requirements.

1. The physician is certified or eligible for certification by the American Board of Obstetrics-Gynecology or the American Osteopathic Board of Obstetrics-Gynecology, and the physician satisfactorily completes at least 15 hours of Continuing Medical Education each year in obstetrics-gynecology.

2. The physician has admitting and surgical privileges at a nearby licensed hospital which has an operating room, blood bank, and an intensive care unit. The hospital shall be accessible within 20 minutes driving time during the usual hours of operation of the clinic.

3. The procedure shall be done in a location which is designated by the Department of Health as a licensed ambulatory care facility (LACF) authorized to perform surgical procedures as in subsection (e) above. The LACF shall be licensed by the Department of Health as an ambulatory care facility authorized to perform surgical procedures. The facility shall be in current and good standing at all times when surgical procedures are performed there. The LACF shall have a written agreement with an ambulance service assuring immediate transportation of a patient at all times when a patient has been admitted for surgery and until the patient has been discharged from the recovery room.

4. The procedure shall be done in an LACF which shall have a Medical Director and a Credentials Committee which have duly

evaluated the training, experience and skill of the physician at continuous and successive levels of complexity of the D & E procedure in pregnancies advancing in stages from 18 weeks LMP through 19 weeks LMP through 20 weeks LMP, and the physician has been granted successive practice privileges consistent with management of the increased risk to the health and safety of the patient at that stage documented in the personnel file maintained for that physician. (Where the applicant physician is also the Medical Director, the physician shall submit a certificate from the Administrator or Chief of Department of a hospital or the Medical Director of an LACF where the applicant has been evaluated and credentialed in a comparable manner.) The physician new to the LACF shall have his or her operating technique evaluated initially and at least yearly by the Medical Director or his or her designee who shall possess appropriate experience with D & E procedures at least as advanced as those for which the applicant physician seeks approval. The applicant shall be evaluated during that number of procedures which shall be adequate to achieve a sufficient professional skill, and the evaluation procedure shall be documented in the personnel file maintained for that physician. The Medical Director shall agree to review the charts of all patients who suffer complications and in addition shall review charts at random, and shall calculate the complication rate of each physician.

5. The physician shall perform the procedure only on a patient who has been examined and found to be within the eligibility criteria established for advanced D & E procedures in the LACF setting.

6. The procedure shall be performed in an LACF providing adequate staff support and resources for the operative procedure as well as interim follow-up and post-operative care, and where a physician is available and readily accessible 24 hours/day to respond to any postoperative problem.

7. The physician shall cooperate with the Medical Director to maintain contemporaneous and cumulative statistical records demonstrating the utilization and safety record of each stage procedure and of each surgeon. Said records shall be available for inspection by the Board and copies shall be submitted to the Board

semi-annually. These records shall include the following information and data shall be maintained in records compiled monthly, but individual patients comprising the lists shall be identified only by date and by initials and/or case number:

i. Number of patients who received termination procedures;

ii. Number of patients who received laminaria or osmotic cervical dilators who failed to return for completion of the procedure;

iii. Number of patients who reported for postoperative visits;

iv. Number of patients who needed repeat procedures;

v. Number of patients who received transfusions;

vi. Number of patients suspected of perforation;

vii. Number of patients who developed pelvic inflammatory disease within two weeks;

viii. Number of patients who were admitted to a hospital within two weeks of the procedure.

ix. Number of patients who died within 30 days.

Subparagraphs ii. through ix. above shall be summarized by number and percentage of monthly total for post-18 week procedures. The Board shall inspect such reports monthly for the first five months and at such further monthly intervals as it deems necessary.

(g) After 20 weeks: A physician may request from the Board permission to perform D & E procedures in an LACF after 20 weeks LMP. Such request shall be accompanied by proof, to the satisfaction of the Board, of superior training and experience as well as proof of support staff and facilities adequate to accommodate the increased risk to the patient of such procedure.

(h) The physician shall make suitable arrangements to insure that all tissues removed shall be properly disposed of by submission to a qualified physician for pathologic analysis or by incineration or by delivery to a person/entity licensed to make biologic and/or tissue disposals in accordance with law including rules of the Department of Health applicable to an LACF.